

Exhibit 1



April 9, 2013

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Director
COOL Division
Livestock, Poultry, and Seed Division
Agricultural Marketing Service
U.S. Department of Agriculture
STOP 0216
1400 Independence Avenue, SW
Room 2620-S
Washington, DC 20250-0216

Re: Docket No. AMS-LS-13-0004 – Mandatory Country-of-Origin Labeling of Beef, Pork, Lamb, Chicken, Goat Meat, Wild and Farm Raised Fish and Shellfish, Perishable Agricultural Commodities, Peanuts, Pecans, Ginseng, and Macadamia Nuts: Proposed Rule; 78 *Fed. Reg.* 15645 (March 12, 2013).

Dear Ms. Henderson:

This letter responds to an Agricultural Marketing Service (AMS or the agency) March 12, 2013, request for comments included in the agency's publication of a proposed rule (proposal) regarding the above-referenced docket. The American Meat Institute (AMI) is the nation's oldest and largest trade association representing packers and processors of beef, pork, lamb, veal, turkey, and processed meat products. AMI member companies account for more than 90 percent of U.S. output of these products.

AMI has carefully reviewed the proposal and concluded that many AMI member companies will be significantly and adversely affected by the proposal. In effect, the proposal seeks to replicate, in large part, the rule that AMS proposed in 2003. This proposal, however, is more problematic than the 2003 version in that, unlike 2003, it would require covered commodities that are eligible to be identified as U.S. origin and also to bear labeling declaring the production steps. In essence, the proposal would force every supplier and every retailer to change its labeling information and systems.

Moreover, if the existing mandatory country of origin labeling (COOL) rules are amended as provided by the proposal there is a virtual certainty that several meat packing establishments will ultimately close because of the costs they will be

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forced to incur in order to implement the proposal's requirements. In effect, the agency is picking winners and losers in the marketplace in order to provide information to consumers that recent research shows they care little about and do not wish to pay for.

Finally, even the most cursory review leads to the conclusion that the proposal will not bring the United States into compliance with the World Trade Organization's (WTO) Appellate Body (AB) ruling. As the AB stated in its examination of the current COOL regulatory scheme:

We emphasize that this lack of correspondence between the recordkeeping and verification requirements, on the one hand, and the limited consumer information conveyed through the retail labeling requirements and exemptions therefrom, on the other hand, is of central importance to our overall analysis under Article 2.1 of the TBT Agreement. This is because, in reaching its finding of detrimental impact, the Panel found that it is the recordkeeping and verification requirements that "necessitate" segregation, and that create an incentive for US producers to process exclusively domestic livestock and a disincentive to process imported livestock. That is, the Panel found that the recordkeeping and verification requirements imposed under the COOL measure lead to the detrimental impact on imported livestock in the US market. We have affirmed this finding above.¹

The proposal not only does not address this fundamental problem, it requires even more segregation, thereby enhancing the discrimination and detrimental impact on imported livestock, all while causing United States plants and businesses, including livestock producers, to close

For the reasons set forth in more detail below AMI urges AMS to withdraw the proposal and seek a solution that will not result in several meat packers likely going out of business if the proposal as written is promulgated and goes into effect.

¹ Appellate Body Report, United States – Certain Country of Origin Labeling (COOL) Requirements, WT/DS384/AB/R, WT/DS386/AB/R, adopted 23 July 2012, at para. 348 (Emphasis added).

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The Agricultural Marketing Service Failed to Consider the Proposal to be Economically Significant and Failed to Conduct the Appropriate Economic Analysis

AMS makes several incorrect assertions in the preamble in an apparent attempt to gloss over facts and circumstances that will add costs beyond those directly related to changing labels to reflect the different production steps – born, raised, and slaughtered. Specifically, the agency states that “[T]his requirement will provide consumers with more specific information on which to base their purchasing decisions without imposing additional recordkeeping requirements on industry” and further that AMS does “not anticipate that this proposed rule will require additional recordkeeping or any new systems to transfer information from one level of the production and marketing channel to the next.”²

In short, the agency repeatedly asserts that the only costs attendant to this proposal will be those involved in changing labels to reflect production steps. This assertion is simply wrong.

A. The Meat Industry Utilizes the Current Rule’s Practice of Commingling and Prohibiting that Practice Will Impose Significant Costs not Considered by AMS

The ability to commingle animals of different origins and use the multiple countries or so called Category “B” label for the products derived from those animals is critically important to many packers and others down the supply chain. The proposal, however, would eliminate a packer’s ability to commingle animals of different origins and the muscle cuts derived from them. Problematic is the fact that, although AMS acknowledges “the labeling scheme afforded by commingling,” the agency does not anywhere in its economic analysis consider the costs attendant to denying packers and others the ability to commingle and utilize that system. These costs are significant and should have been considered prior to developing the proposal.

Interestingly, AMS seems to ignore the fact that commingling occurs regularly and that the Category B label is used in the marketplace. Indeed, in the preamble AMS states that

² 78 *Fed. Reg.* 15647, 15647-15648 (Mar. 12, 2013). AMS invites comment on its assumptions and “welcomes data that would help to inform a more refined analysis of the impacts of the rule at various points in production.” *Id.* at 15647.

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Given that the information needed to label production steps is already available and that most packers already segregate animals of differing countries of origin in the slaughter and processing of those animals, the most widespread cost of implementing the proposed amendments is expected to be related to label change; this cost would be incurred partially at the packing or processing facility and partially at the retail level.³

The agency's assertion "that the majority of muscle cut covered commodities are not produced and labeled" does not excuse AMS from calculating and considering the additional costs that eliminating commingling will have on the supply chain.⁴ AMS could and should have used the data that was the foundation of a key argument made by the United States before the WTO – that commingling is occurring. Specifically, the AB stated that

The United States points to evidence showing that a significant proportion of muscle cuts of beef and pork is labelled "Product of the United States, Canada and Mexico", to argue that US producers are choosing to commingle, instead of segregate, their livestock.⁵

In fact, included in the evidence offered by the United States was a USDA survey (of retail product) "indicating that 'approximately 22 percent of beef sold and 4 percent of the pork sold in the United States is derived from commingled livestock or meat (*i.e.*, some combination of Category A, B, and C meat processed together on the same production day)'."⁶ The 22 percent of beef proffered by the United States in the WTO proceedings is significant and it is clear that eliminating commingling will have a significant impact on slaughter and processing facilities using that system, as well as the rest of the downstream supply chain, because the proposal will force them to segregate livestock and meat products, which will increase costs – costs not considered in the proposal.⁷

³ *Id.* citing Appellate Body Reports, *US—Certain Country of Origin Labelling (COOL) Requirements*, WT/DS384/R, WT/DS386/R, paras. 295–310 (adopted July 23, 2012); Panel Reports, *United States—Certain Country of Origin Labelling (COOL) Requirements*, paras. 7.365, 7.403 (adopted July 23, 2012) for the proposition that there will be, in effect, no segregation costs attendant to implementing the proposed rule.

⁴ 78 *Fed. Reg.* 15648 (Mar. 12, 2013).

⁵ Appellate Body Reports, *US—Certain Country of Origin Labelling (COOL) Requirements*, WT/DS384/R, WT/DS386/R, para. 296. In fact, several of the very paragraphs AMS cites in footnote 1 contain a discussion about the Panel's consideration of commingling. See 78 *Fed. Reg.* at 16458, footnote 1, (March 12, 2013).

⁶ *Id.* at para. 296.

⁷ Indeed, even the four percent related to pork is a significant percent in the very low margin meat industry.

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Notwithstanding the agency's contention, the proposal would require plants to employ product segregation systems so that the meat derived from an "all American" or Category A animal, *i.e.* born, raised, and slaughtered in the U.S., is not mixed with muscle cuts requiring labeling declaring the product to be, for example, beef derived from an animal "born in Canada, raised and slaughtered in the United States." The muscle cuts from these various "types" of animals would have to be kept separate as the carcasses proceed down the line, enter the coolers, proceed through the fabrication process, and ultimately as the meat is stored and distributed.

How much those costs would be is a function of several factors, with a critical factor being how many mixed origin or non-U.S. animals a plant processes and how they are mingled throughout a day's livestock deliveries. Consider, for example, the fact that a plant processing these livestock almost certainly would have distinct breaks in production so the plant would incur lost slaughter/processing time.

Industry estimates for facilities that use Category A and B livestock could be as few as 2 per day to as many as 5 per day, depending on inventory fluctuations, livestock deliveries, *etc.* Cost estimates for large processing facilities for changes or "downtime" due to a variety of factors, *e.g.*, processing different grades of animals, suspension of operations for animal welfare issues, *etc.*, run from \$750-\$900 per minute. Common "downtime" for large pork processing operations can range from 5-7 minutes and in cattle operations from 2-4 minutes.

Using these values, costs for a hog slaughter facility that is processing and segregating products, on average, would be \$4500-\$5000 per change. If the plant has an additional two changes per day or 10 changes per week, the added costs for this issue is between \$45,000 and \$50,000 per week, or about \$2.5 million annually – for one plant. A plant more heavily reliant on using Canadian hogs and incurring up to 5 changes daily or 25 per week would absorb additional downtime losses of approximately \$125,000 per week or about \$6.5 million annually.

For beef, although change times are generally shorter, the origin mix can be more complex because the industry utilizes cattle not only of U.S. origin, but also Canadian and Mexican origin. Because of this greater complexity, the number of additional changes could be 30 or more. For larger facilities with that many extra changes annual added costs could be more than \$4 million annually. Moreover, the costs incurred through added downtime do not include additional costs if more staff is needed in the pens, on the slaughter floor, and in processing areas.

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There are at least 15 large cattle slaughter plants that process mixed origin livestock and at least 6 such hog slaughter facilities. Using the values developed above, the additional downtime costs associated with the loss of commingling in the beef sector is at least \$60 million and another \$27 million for pork (using a \$4.5 million average). This \$87 million loss does not include the cost estimate that AMS included in the proposal, nor does it include any costs for smaller companies, who may in some cases be even more reliant on foreign origin livestock.

In fact, the prohibition on commingling could have an even greater adverse impact on smaller packers. For example, a very small cattle slaughter company (fewer than 100 employees) that currently commingles production and uses the B label, estimates that it would have to add two people to the slaughter floor and two people in the beef cooler, as well as an additional person in the administrative office to handle additional paperwork associated with segregation. The company estimates that this new staffing would cost \$135,000.00 annually, not including training and benefits. In addition, because of the lost production time and the need to segregate carcasses and meat in the coolers and through the processing system, the company would incur additional costs caused by an additional five hours per week (one hour per day) for the 40 people already working on the harvest floor and beef cooler amounting to additional \$140,000.00 annually. In short, for a small plant (slaughtering approximately 39,000 head annually) with 40 people currently working on the slaughter floor and in the coolers the cost associated with losing the ability to commingle is approximately \$275,000 annually. Volume is critical to profitability, indeed viability, in the meat packing industry, where margins are extremely slim. Indeed, the \$275,000 in newly found costs is approximately one percent of the company's annual sales, which is approximately the company's annual profit.

An alternative approach to examining the loss of commingling issue is to consider some work done when AMS published its original proposal in 2003. In response to that proposed rule, which is markedly similar to the current proposal, led Sparks Companies to analyze the 2003 proposed rule and submit comments.⁸ Using that construct AMI submits the following.

Foreign origin cattle make up about six to seven percent of the fed cattle slaughtered in the U.S. Using the 22 percent value proffered by the United States in the WTO case, Category A cattle must be mixed with foreign origin livestock and hence would have to be segregated in the proposed labeling system. Previous cost estimates for packer/processors in an analysis done by Sparks Companies in response to the agency's first proposed rule showed the per head cost ranging from

⁸ See *Comments on Guidelines for Voluntary Country of Origin Labeling Program*, Sparks Companies, Inc., April 2003. (Attached hereto as Attachment A.)

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\$15-18 per head.⁹ Presuming fed steer and heifer slaughter of approximately 27 million head and applying the 22 percent figure used by the United States means approximately 5.94 million head could be affected by the prohibition on commingling, resulting in a costs between \$89.1-\$106.2 million dollars.

For pork products, Sparks estimated the costs for a non-integrated system to range from \$2-\$6 per head.¹⁰ Approximately 5.5 million hogs (feeders and finished) entered the U.S. last year. With approximately 110 million head slaughtered that 5.5 million head is slightly higher than the four percent proffered by the U.S. Even using the smaller four percent value, one would apply the cost range of \$2-\$6 per head to 4.4 million hogs, providing a cost range of between \$8.8-\$26.4 million.

In short, the annual operating costs for the fed cattle and hog processing industries would range from \$97.9 to \$132.6 million under the proposal without commingling and with the necessary segregation. These values do not include costs attendant to cows and bulls, veal, lamb, and chickens. Nor do these cost estimates include the costs that would be incurred by producers and the retail distribution chain.

In addition to increased operating costs, facilities that commingle and choose to segregate would almost certainly incur added capital costs attendant to segregation. For example, there likely would be capital costs associated with the yards because of the need to hold animals in segregated pens. There would be significant issues associated with segregating products in the coolers and developing new SKUs for the differently labeled A, B, and C category products.

In that regard, capital expenditures are estimated to be as high as \$50 million to reconfigure a large cattle slaughter and beef processing plant to accommodate the issues identified above. For other, smaller cattle slaughter and processing facilities, cost estimates run from approximately \$20 million to \$30 million per plant. AMI estimates that there are likely 15-20 medium to large cattle slaughter facilities that currently process cattle of either Canadian or Mexican origin (B or C category). Assuming that most, if not all of these facilities continue current practices of accepting B or C category cattle on one or more days, capital expenditures could be approximate \$500 million.¹¹ That \$500 million price tag does not include smaller facilities among the other approximately 800 cattle plants that

⁹ *Id.* at 4.

¹⁰ *Id.* at 5.

¹¹ This value assumes that four of the plants are large (\$50 million per plant) and another 12 plants are medium (\$25 million) in size.

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slaughter and process cattle of foreign origin. Similarly, estimates of capital costs for hog slaughter and processing operations range from \$12 million to \$25 million. AMI's estimate of capital expenditures for the hog processing/pork industry is at least \$72 million.

B. The Proposal Ignores Other Significant Cost Considerations

Analyzing the proposal from a different perspective using different economic assumptions leads to the conclusion that the beef processing margin lost could range from approximately \$80 million to more than \$300 million annually and from approximately \$18 million to more than \$200 million in the pork processing sector. The range for each sector in a function of the assumptions made as to how many fewer Canadian and Mexican cattle are processed and how many fewer Canadian hogs are processed.

What the agency has failed to incorporate into its analysis is the lost efficiency to the packing industry that would occur if the retail community elects not to accept any muscle cut covered commodities that are not Category A. Although not uniformly distributed thought the year on average there are approximately 37,000 cattle processed weekly that have either Mexican or Canadian "heritage." That number represents approximately six percent of the weekly slaughter. Likewise, there are approximately 115,000 hogs of Canadian heritage, five percent, slaughtered weekly in the United States.

If the retail industry elects to move away from accepting any muscle cut covered commodities other than those in Category A, as many retailers have indicated they will do to avoid segregation and other costs, the \$300 million estimate in lost packer efficiency caused by stripping out more than six percent of the slaughter would apply. If retailers react similarly with respect to pork products, the lost efficiency caused by losing almost five percent of the annual slaughter would exceed \$200 million annually,

The most conservative estimates, losing only 10,000 per week in cattle and hogs, still yield annual losses to the beef and pork sectors of \$82 million and \$18 million respectively. Assuming that some retailers that currently accept Category B product continue to do so, the losses incurred in the beef and pork sectors would be \$164 million (20,000 head loss) for beef and \$46 million (25,000 head loss) for pork.

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Concomitant with those efficiency losses are the lost jobs in the meatpacking sector. AMI estimates that the worst case scenario would result in more than 3300 jobs lost in the beef and pork processing sector. Even the more conservative, “middle of the road,” slaughter reduction estimates show losses in excess of 1300 jobs.

Yet nowhere in the preamble or the cost and benefit analysis is there any discussion about the cost attendant to the lost productivity when the retail sector acts in the most rational way and rejects, even more than it did in 2009, covered commodities that don’t bear the Category A label.

The proposal also gives no consideration to the impact on exports. Although exports are not subject to COOL, products intended for export typically bear a “Product of the U.S.” label, which is permitted under the current labeling system. Unclear and apparently not considered by AMS is whether the new labeling scheme will be acceptable to trading partners. The proposed labeling for all products, even those eligible for the “A” label, would not permit the Product of the U.S. label and instead require the production step concept, *i.e.*, Born, Raised, and Slaughtered. Given the adverse impact the proposal would have on them, it seems a dubious proposition that the proposed label would be acceptable to two of the United States largest markets, Canada and Mexico. That means the proposal would put every single plant that exports in the difficult position of having two different labeling programs – one for domestic retail and one for export.

More specifically, consider the logistical and expensive challenges attendant to processing and preparing a load of beef or pork muscle cuts bearing any of the currently acceptable labels, *e.g.* “Product of the U.S.” or “Product of the U.S., Canada,” for export only to have the order cancelled or a market closed for one of many reasons the industry and AMS has observed. The costs and challenges attendant to relabeling to make the product eligible for domestic sale at retail would be significant, and perhaps virtually impossible if the product were case ready.

Although not strictly part of COOL, the agency does not seem to factor into its analysis the adverse impact that the added costs that are virtually certain to flow from this proposal would have on the American meat industry’s ability to compete in the global marketplace. Setting aside the unknown with respect to whether trading partners will accept the new labeling scheme, the proposal will impose costs that U.S. competitors will not incur. The added costs will make it more challenging for the United States to compete in the global market for protein.

Finally, the proposal ignores other significant costs and effects that are almost certain to arise. For example, it is unclear whether the current affidavit system will satisfy the proposal’s requirements. Livestock producers who on an

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ongoing basis provide animals eligible for the B label likely would have to amend their practices with respect to each lot of animals delivered. Similarly, truckers would have higher costs because of the need to keep their loads segregated or, in the alternative transport less than capacity loads to achieve segregation, which will increase delivery costs.

C. The Proposal Would Pick Winners and Losers in the Marketplace

Given the significant physical and economic challenges and costs discussed above, not only for meat packers and processors but throughout the downstream supply chain, many retailers and consequently their suppliers will abandon using any livestock other than those eligible for the Category A label. Such a shift likely would result in at least two and perhaps more livestock processors, as well as some unknown number of livestock producers, closing or going out of business. That closures will occur if the proposal is implemented is not in doubt-- the only question is how many plants will close and how many producers will go out of business.

When COOL went into effect in 2009, many retailers elected to accept Category A product only. A number of retailers, as evidenced by the USDA survey, were open to receiving mixed origin labeled products. It is an unassailable fact that if the proposal is implemented a significant majority of retail entities that currently accept mixed origin labels on meat muscle cut covered commodities will stop doing so. Simple logic and basic economics dictate that today's retailer that elects to accept covered commodities that bear the "Product of U.S., Canada" or Product of U.S., Mexico" will almost certainly move to accept only "Born, Raised and Slaughtered in the U.S." under the proposed rule. This conclusion is true because to do otherwise would force the retailer to incur some of the same costs of segregation discussed above – costs that the retailer avoids in the current mixed origin scenario.¹²

Even if a retail customer is willing to accept B or C label products, the fact is, there simply are not enough B or C livestock in any one region to allow a plant to dedicate itself to process B or C (the plant would have to be dedicated either to B or C to avoid segregation) livestock and remain viable. For example, in 2012 approximately 2,250,563 head of cattle entered the United States from Canada, 781,712, and Mexico, 1,468,851. For swine, 5,650,835 pigs entered the U.S., 4,790,212 of which were feeder pigs. Total U.S. cattle slaughter in 2012 was 32.4 million head (including cows and bulls), which means B and C category livestock accounted for approximately 6.95 percent of the total slaughter (and a higher percentage of fed cattle slaughter). Similarly, the approximately 5.65 million

¹² Although the United States argued that commingling occurred in its WTO pleadings there is little, if any, acknowledgment of that position in the preamble.

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imported hogs accounted for about five percent of the total hog slaughter in 2012. The distribution of the B and C livestock, however, is not uniform across the country and for that reason plants in some regions are more reliant on foreign origin livestock.

For example, according to USDA data about 1.18 million head of cattle were processed in the Pacific Northwest, which includes Alaska, Idaho, Oregon, and Washington and of those, 932,000 were fed cattle.¹³ Washington has two significant cattle processing facilities and none of the other states listed above have large processing plants. Canadian cattle imports, including feeder cattle, into Washington totaled more than 265,000 head, which means that cattle of some Canadian origin, Labels B or C, account for more than 28 percent of the cattle processed in the four state region and almost certainly a higher percentage of those processed at the two large plants in Washington.

The two Washington plants have been accepting Canadian B and C label cattle regularly because those cattle are necessary to provide enough volume for the plants to operate. Moreover, those plants have been using, and retailers have been accepting, products bearing the mixed origin labels. Given the retail community's clear indication that even retailers that have been willing to accept B label product will no longer do so if the proposal goes into effect, the packers who have been supplying that product will have to switch to processing A cattle only to meet customer demand. The problem in the Pacific Northwest is that there are not enough Category A product in region to be able to satisfy the demand of those two plants and other plants in the state or the region. Moreover, reaching out to other regions to procure livestock would be difficult because transporting livestock across the Rocky Mountains is a daunting task and raises animal welfare concerns. In short, implementation of the proposal likely would cause at least one cattle processing facility in the Pacific Northwest to close.¹⁴

Similar concerns could arise for a facility in Utah that has seen its volume of B and C label cattle rise by almost 54,000 head (78,000 to 132,000 head) from 2009 to 2012. Cattle slaughter in Utah is approximately 640,000 head, which means that the B and C cattle account for approximately 20 percent of the total slaughter in the state, and likely more for a particular facility. Replacing 20-30 percent of the volume of cattle a plant routinely processes with A category cattle, presuming retail customers will accept only one category, again would present significant challenges.

¹³ United States Department of Agriculture National Agricultural Statistics Service, Agricultural Statistics Board, January 24, 2013.

¹⁴ Given the importance of volume in the meatpacking industry, there is not enough Category B or C cattle to be able to run a facility efficiently and one would be forced to choose because segregation costs would still be incurred when handling Bs and Cs.

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Similar issues exist for facilities in Texas that historically have relied on processing cattle that were born in Mexico and finished in the United States. Mexico exported approximately 1.47 million feeder cattle to the U.S. in 2012. AMI has identified at least four medium to large-sized facilities in Texas that process cattle born in Mexico.¹⁵ The heavy reliance on processing Mexican feeder cattle, coupled with the historically small domestic cattle herd size, raises the same specter in Texas that exists in Washington – a shift by retail customers to accept A label only will lead to a plant closing because of an insufficient supply Category A cattle to service the plants in Texas in particular.

That plants will close is not promulgating an idle threat. These concerns are based in part on what occurred when the Canadian border was closed in 2003 due to BSE concerns. Then, the Department of Agriculture closed the border to cattle from Canada for animal health reasons. Within the year at least three cattle processing plants in the U.S. that relied on Canadian cattle closed – Simplot Packing near Boise, Idaho, Corn Belt Beef Corp. in Oak Park, Michigan and Ken Meyer Beef in Cincinnati, Ohio. All of these companies cited the absence of Canadian cattle as a key factor in closing. Moreover, given that a large plant in Texas closed in recent months, at least in part due to the challenges associated with the current regulation, there is legitimate concern regarding additional plant closures in the region.

The proposal, if implemented, will result in a *de facto* closing of the border to foreign origin livestock. The borders will not be closed because the government ordered them closed. Instead they will close to foreign livestock based on retailers' decision to no longer accept meat from Category B and C livestock – a logical market reaction to the cost and regulatory challenges presented by segregating livestock and meat that will be necessary if the proposal goes into effect. The plain fact is, whatever the regulatory scheme, effectively closing the border will cause some as yet unknown number of plants to cease operations.¹⁶

D. Pursuant to Executive Order 12866 the Proposal is a Significant Regulatory Action and Should be Withdrawn

The discussion above identifies two different scenarios that meatpackers will face if the proposal is implemented. Given the significant adverse effect the

¹⁵ There are other, smaller plants that use cattle with a Mexican heritage. The small slaughter facility discussed above is one. In addition there are plants of significant size in other states that also utilize cattle with Mexican heritage.

¹⁶ That the domestic cattle herd is even smaller today than it was in 2003 only contributes further to this problem.

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proposal would have in either scenario and based on the economic information provided in the preamble the agency has seemingly ignored its obligations under Executive Order 12866 (EO 12866).

EO 12866 requires regulatory agencies to conduct an economic impact analysis of any “significant” rule, with special consideration given to small entities. EO 12866 defines a “significant regulatory action” as any “regulatory action that is likely to result in a regulation that may: (1)[H]ave an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities.”¹⁷

Under either prong of the test referenced above, the proposal is a significant regulatory action. The estimated annual operating costs for packers and processors alone likely exceed \$100 million, and those values do not include costs incurred by distributors, wholesalers, and retailers. Under the other prong set forth above, the likely shuttering of several packing facilities and the threat to feedlots and hog production operations with a business model founded on finishing Canadian feeder pigs certainly is “adversely affect[ing] in a material way the economy, a sector of the economy, productivity, competition, jobs...”¹⁸

In short, any reasonable analysis of the industry and the proposed rule would lead to the conclusion that the “annual effect on the economy” would exceed \$100 million and just as relevant that the proposed rule would “adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs.”¹⁹ Here, the agency has failed to properly conduct a thorough economic impact analysis as required. That failure compels the agency to perform that analysis and then propose a rule consistent with its analysis.

E. The Proposal is Subject to Executive Order 13563 and Should be Withdrawn

Executive Order 13563 (EO 13563) provides that:

Our regulatory system . . . must identify and use the best, most innovative, and least burdensome tools for achieving regulatory ends. . . As stated in (Executive Order 12866) . . . each agency must . . .

¹⁷ *Id.* at section 3(f)(1). Costs and benefits include both quantifiable measures (to the fullest extent that these can be usefully estimated) and qualitative measures of costs and benefits that are difficult to quantify, but nevertheless essential to consider. Executive Order 12866 Section 1(a).

¹⁸ *Id.* (Emphasis added).

¹⁹ *Id.* at section 3(f)(1).

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propose or adopt a regulation only upon a reasoned determination that its benefits justify its costs. . . (and) tailor its regulations to impose the least burden on society.²⁰

In effect, EO 13563 requires agencies to “take into account benefits and costs, both quantitative and qualitative.”²¹ The proposal fails the standard established by EO 13563. To try to get around EO 13563 the agency has assumed away most of the costs that, as the discussion above demonstrates, the industry will incur. Simply put, the agency chooses to ignore the significant cost burdens packers and the rest of the supply chain will bear. Implementing the proposed rule will cost packers and their customers hundreds of millions of dollars, or worse, cause some of them to close their doors.

On the other hand, as it did in in 2003 and again 2009, AMS again “has been unable to quantify incremental economic benefits from the proposed labeling of production steps . . .”²² Although the agency references small economic benefits, AMS has never -- not in 2003, not in 2009 and not in 2013 - - provided a number representing the economic benefit. Indeed, once again the agency again invites commenters to do its job for AMS and provide some economic justification for the rule.²³ Instead, the only benefit that AMS can point to is the purported qualitative benefit attendant to providing some unknown number of consumers with additional information about the production steps attendant to some of the meat products they buy.²⁴

Given the extensive costs associated with the proposal and the agency’s inability over a decade to quantify any economic benefit, the costs of the proposal outweigh any limited benefits. For that reason, the proposal fails to meet the requirements of EO 13563.

²⁰ Exec. Order No. 13563 (January 18, 2011).

²¹ *Id.*

²² 78 *Fed. Reg.* 15647 (March 12, 2013).

²³ *Id.* “... the expected benefits from implementing mandatory COOL requirements remain difficult to quantify. This conclusion holds true for the proposed amendments to the labeling requirements under the current COOL regulations. The Agency invites comment on the benefits of this proposed rule and welcomes data that would help to inform a more quantifiable analysis.” (Emphasis added)

²⁴ See discussion *infra*, Mandatory Country of Origin Labeling is an Expensive Labeling Scheme that Provides Information about which most Consumers Care Little.

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Mandatory Country of Origin Labeling is an Expensive Labeling Scheme that Provides Information About Which Most Consumers Care Little

In 2003, AMS stated that the benefits of COOL “are difficult to quantify.”²⁵ Indeed, the agency went on to say that “we believe that the benefits will be small and will accrue mainly to those consumers who desire country of origin information” and further that there is “little evidence to support the notion that consumers’ stated preferences for country of origin labeling will lead to increased demands for covered commodities bearing the U.S.-origin label.”²⁶ A decade later the agency still cannot quantify the benefits of COOL and certainly is unable to identify any significant benefits related to the labeling contemplated by the proposal.

Contrary to the agency’s statement in the proposal, the agency did not conclude “in the PRIA and FRIA that the economic benefits from the COOL requirements are positive,...”²⁷ Specifically, AMS concluded in the final rule preamble that

after reviewing many studies and comments, the economic benefits from COOL will be small and will accrue mainly to those consumers who desire country of origin information. Several analysts concluded that the main benefit is the welfare effect resulting from removing informational distortions associated with not knowing the origin of products. Numerous comments received during the rulemaking process indicate that there clearly is interest by some consumers in the country of origin of food. The mandatory COOL program may provide additional benefits to these consumers. However, commenters provided no additional substantive evidence to alter the Agency’s conclusion that the measurable economic benefits of mandatory COOL will be small.²⁸

The assertion that the economic benefits of COOL are “positive” does not comport with the agency’s own estimate that the “first-year incremental costs for growers, producers, processors, wholesalers, and retailers are \$2.6 billion” and the “estimated cost to the United States economy in higher food prices and reduced food

²⁵ 68 *Fed. Reg.* 61955 (Oct. 30, 2003)

²⁶ *Id.*

²⁷ Ironically, AMS follows that observation with a conclusion that the incremental economic benefits from the proposal “will be comparatively small relative to those that were discussed in the 2009 final rule.” *Id.* See discussion at 61955-56.

²⁸ 74 *Fed. Reg.* 2681 (Jan. 15, 2009) (Emphasis added).

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production in the tenth year after implementation of the rule is \$211.9 million.”²⁹ Those costs overwhelm the unquantifiable benefits that AMS identified – limited consumer interest in knowing the origin of food. Indeed, in its economic analysis the agency stated that it found “little evidence that consumers are likely to increase their purchase of food items bearing the United States origin label as a result of this rulemaking” and that the “[C]urrent evidence does not suggest that United States producers will receive sufficiently higher prices for United States-labeled products to cover the labeling, recordkeeping, and other related costs.”³⁰

Notwithstanding the discussion above, AMS invited comment on the benefits of the proposal and welcomes data that would help to inform a more quantifiable analysis.³¹ Because the agency provided the shortest comment period possible (30 days) and denied a request to extend the comment period, which would have provided some reasonable opportunity to conduct research regarding the issue, it is virtually impossible to provide meaningful data at this time. Notwithstanding those limitations, based on other recent research, AMI submits that there will be little, if any, economic benefit attendant to the proposed labeling scheme.

A November 2012 study conducted at Kansas State University (KSU) affirms previously articulated research, and the AMS previous conclusion, regarding the very limited, virtually nonexistent, benefits attendant to COOL.³² The key findings of the KSU research are instructive and although the study did not speak to the production step issue, it provided useful information about COOL.

Among the study’s findings is that COOL as currently implemented did not impact demand for covered commodity meat products. This conclusion is consistent with the agency’s analysis and expectation expressed as long ago as 2003.³³ This conclusion is not terribly surprising given that another finding is that “typical U.S. residents are unaware of MCOOL and do not look for meat origin information.”³⁴

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.* That AMS admitted it has no data regarding the proposal and felt compelled to ask for it is representative of the inadequacy of the proposal. The agency should not be publishing a proposed rule without being able to articulate the benefits that it expects to flow from adoption of the proposal and be able to provide a measureable regarding same.

³² See *Mandatory Country of Origin Labeling: Consumer Demand Impact*, Kansas State University, Department of Agricultural Economics November 2012 (Attachment B).

³³ 68 *Fed. Reg.* 61955-56 (Oct. 30, 2003).

³⁴ *Mandatory Country of Origin Labeling: Consumer Demand Impact* at 2. See also *Do Consumers Respond to Country-of-Origin Labeling?* by Fred Kuchler, Barry Krissoff, and David Harvey, in *Journal of Consumer Policy*, 2010, Vol. 33, pp. 323-337. <http://www.ers.usda.gov/amber-waves/2012-june/consumers-appear-indifferent.aspx>. In the shrimp study the authors stated that “If COOL mattered to consumers, shrimp purchases after the rule’s April 2005 implementation would have shifted between the types of products. Instead, no such demand shift was observed.” The Amber

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More directly related to the question presented by AMS the KSU study authors state that “[G]iven the costs of compliance introduced by MCOOL and no evidence of increased demand for covered products, our results suggest an aggregate economic loss for the U.S. meat and livestock supply chain spanning from producers to consumers as a result of MCOOL implementation.”³⁵ Such a result is exactly what was anticipated a decade ago. Indeed, the proposed labeling scheme could exacerbate the problem in that it requiring labels to declare “Born, Raised and Slaughtered in the U.S.” could adversely affect demand by bringing front and center the issue of slaughtering livestock.

The KSU study is also instructive in that the finding that consumers did not value a Product of the United States label over a Product of North America could have some bearing on the instant proposal. The current labeling scheme does not impose the added costs associated with prohibiting commingling and, effectively, use of the B label more widely than will occur if the proposal is implemented. Indeed, the KSU study stated that

If a *Product of North America* label is less expensive to implement in the context of MCOOL and consumers fail to place a higher value on products carrying *Product of the United States* labels, economic gains would occur by utilizing the less expensive labeling requirement.³⁶

Given that the proposed labeling regimen will be more expensive than the current system and in light of the findings of the KSU study it is readily apparent that the proposal will result in an economic loss.

The Proposal will not Bring the United States into Compliance with the WTO Appellate Body Ruling

The proposal if implemented will not bring the COOL measure into compliance with United States trade obligations under the WTO. The national origin discrimination found in COOL is a product of a statutorily-mandated labeling system.³⁷ The regulatory changes incorporated in the proposal do not address the underlying problems identified by the WTO bodies. Furthermore, the proposal

Waves paper (a USDA publication – see Attachment C) also stated that when the researchers shifted their focus to more educated households, “Findings from past studies on nutrition labeling suggest that more educated consumers are more likely to read food labels. This subset of consumers did not alter their shrimp purchases in response to COOL either.”

³⁵ *Id.* at 3.

³⁶ *Id.* (Emphasis added).

³⁷ 7 U.S.C. 1638, section 282(2).

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would not adequately address the concerns raised by the AB under the “legitimate regulatory distinction” exception to national origin discrimination under the Agreement on Technical Barriers to Trade (TBT) Article 2.1. If COOL is to qualify for this exception, the necessary reforms must go far beyond the regulatory changes that AMS has proposed and include statutory modifications.

Finally, the proposal would do nothing to address the potential national origin challenges that still remain under TBT Article 2.2 and GATT Article III: 4 of the WTO agreements. The proposed changes are targeted to comply with the AB’s findings under TBT Article 2.1, but fail to address the fundamental problems with COOL that both Canada and Mexico will likely revisit in future WTO litigation. Therefore, in order to meet its international trade obligations, bring COOL into compliance with the WTO decisions, and avoid retaliation from two of its most important trading partners, the United States must address the fundamental problems found in COOL through legislative action.

A. The Proposal is Inconsistent with TBT Article 2.1

The proposed regulations do not bring COOL into compliance with the AB’s opinion under TBT Article 2.1. The focus of the AB opinion, as far as TBT Article 2.1 is concerned, is whether the detrimental impact COOL causes to foreign producers is acceptable because it stems directly from a “legitimate regulatory distinction.”³⁸ If the detrimental impact stems directly from a legitimate regulatory distinction, then the measure is consistent with Article 2.1 obligations.

The stated objective of COOL, to inform consumers of the origin of their meat products, is a legitimate objective to be pursued by technical regulation. However, the AB found that the detrimental impact caused by COOL does not stem directly from a legitimate regulatory distinction because it was not designed and applied in an even-handed manner.³⁹ The AB found that COOL was designed and applied in such a way that it leads to arbitrary or unjustifiable discrimination, which indicates that it is not designed or applied in an even-handed manner. Therefore, the detrimental impact cannot stem directly from a legitimate regulatory distinction and thus COOL is discriminatory based on national origin and prohibited under Article 2.1.⁴⁰

³⁸ *Id.* at para. 340.

³⁹ *Id.* at para. 349.

⁴⁰ *Id.* at para. 347.

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In reaching this conclusion, the AB found that “the informational requirements imposed on upstream producers under the COOL measure are disproportionate as compared to the level of information communicated to consumers through the mandatory retail labels.”⁴¹ Nothing in the COOL measure “explains or supplies a rational basis for this disconnect.”⁴² The AB cited two specific (and mutually exclusive) examples in support of this conclusion: 1) the information communicated on the labels does not meaningfully inform consumers of the origin of each production step, and 2) there are a substantial number of covered commodities that are not subject to the labeling requirements.⁴³ Due to judicial economy, the AB’s analysis on this factor ended with these two examples. However, there are potentially other examples of arbitrary and unjustifiable discrimination indicating a lack of even-handed design and application for COOL that could be raised by Canada and Mexico in future litigation.

The proposal purportedly is intended to address the first example cited by the AB, *i.e.*, the lack of meaningful information conveyed to consumers compared to the substantial information collected by upstream producers. The proposal, however, fails to adequately rebalance this nexus. The revised labels provide consumers with more detailed information about the country of origin for each production step for some meat products, but because of the increased costs associated with further segregation and recordkeeping requirements (detailed earlier), the proposal also imposes a much higher burden on upstream suppliers. That additional burden exacerbates the imbalance and does not justify the still-limited amount of information conveyed to consumers.

Moreover, the information conveyed by the proposed labels remains arbitrary with regard to Category D products, *e.g.*, *Product of Canada*. Products bearing this label do not provide consumers with the same information about the national origin of each production step as the other three label categories, highlighting the arbitrary nature of this information. Therefore, the application of the proposed labels still leads to arbitrary or unjustifiable discrimination on this point, indicating the measure is not designed or applied in an even-handed manner, and fails to adequately address the concerns raised by the AB opinion.

Furthermore, the proposal does not address in any manner the AB’s second example of arbitrary application cited in the opinion. Although the AB discusses the first example more extensively, the fact that a large number of covered commodities are not subject to the labeling regime at all is a significant indicator of the measure’s arbitrary application. Because the two examples are mutually

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*

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exclusive of one another, this second example must be addressed in order to bring COOL into compliance with the AB opinion. More specifically, the AB states that COOL's design and application is arbitrary or creates unjustifiable discrimination "...*either* because [1] the prescribed labels do not expressly identify specific production steps and, in particular for Labels B and C, contain confusing or inaccurate origin information, *or* [2] because the meat or meat products are exempt from the labeling requirements altogether."⁴⁴ The mutual exclusivity is reiterated elsewhere in the AB opinion:

We emphasize that this lack of correspondence between the recordkeeping and verification requirements, on the one hand, and the limited consumer information conveyed through the retail labeling requirements *and exemptions therefrom*, on the other hand, is of central importance to our overall analysis under Article 2.1 of the TBT Agreement.⁴⁵

...information regarding the origin of all livestock will have to be identified, tracked, and transmitted through the chain of production by upstream producers in accordance with the recordkeeping and verification requirements of the COOL measure, even though 'a considerable proportion' of the beef and pork derived from that livestock will ultimately be exempt from the COOL requirements and therefore carry no COOL label at all.⁴⁶

The proposal does not address this second example in any way. Therefore, as it relates to the large number of products that are exempt from labeling requirements altogether, the COOL measure remains inconsistent with the AB opinion. Because a significant exception to the labeling requirements in COOL is the foodservice exception found in the text of the statute, to meaningfully address this point in the AB opinion COOL must be statutorily altered to bring it in compliance with TBT Article 2.1.

B. Potential TBT Article 2.2 Challenges Remain

The AB did not complete its analysis regarding TBT Article 2.2 to determine whether the COOL measure is more trade restrictive than necessary to fulfill a legitimate objective in violation of the article.⁴⁷ That analysis was not completed because there was not sufficient factual information available on appeal from the

⁴⁴ *Id.* at para. 349. (Emphasis added).

⁴⁵ *Id.* at para. 348. (Emphasis added).

⁴⁶ *Id.* at para. 344.

⁴⁷ *Id.* at para. 490.

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Panel's decision.⁴⁸ The AB found COOL's stated objective, to provide consumers with meaningful product origin information, to be legitimate, but did not have enough information to determine whether the measure is more trade restrictive than necessary to fulfill this objective.⁴⁹ Although the AB did not affirm the Panel's ultimate conclusion on the matter, it offered guidance for future WTO review that suggests COOL is more trade restrictive than necessary under this article. The Article 2.2 claim remains open for Mexico and Canada to revisit in future actions and is not adequately addressed by the proposal.

Specifically, the AB identified three factors to consider when evaluating whether a measure is more trade restrictive than necessary to fulfill a legitimate objective under Article 2.2:

The degree of contribution the measure makes to the stated legitimate objective;

The trade restrictiveness of the measure; and

The nature of the risks at issue as well as the gravity of the consequences that would arise from non-fulfillment of the pursued objective.⁵⁰

Furthermore, proposed alternatives to the measure will be analyzed to determine if an alternative exists that provides the same level of protection and is less trade restrictive than the measure under review.⁵¹

The AB attempted to complete its analysis using the factual information available on appeal. Although it did not reach a justiciable conclusion using the available information, the AB stated:

Overall, in our view, the Panel's factual findings suggest that the COOL measure makes some contribution to the objective of providing consumers with information on origin; that it has a considerable degree of trade-restrictiveness; and that the consequences that may arise from non-fulfillment of the objective would not be particularly grave.⁵²

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.* at para. 471.

⁵¹ *Id.*

⁵² *Id.* at para. 479.

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Based on the guidance provided in the AB opinion, if challenged it seems likely that the proposal would be found to be more trade restrictive than necessary to fulfill a legitimate objective, and therefore violate Article 2.2. The degree to which the proposal contributes to the legitimate objective is slight, and as the AB noted in its discussion, the COOL measure as a whole has a considerable degree of trade restrictiveness and the consequences arising from non-fulfillment of the objective are not particularly grave. In short, implementing the proposal would certainly invite Canada and Mexico to challenge the measure and they would enjoy a strong likelihood of success. Once again, the only way to adequately address the remaining Article 2.2 claims will be to restructure the COOL statute.

C. Article III: 4 Challenge Under GATT 1994

Finally, regardless of its level of compliance with the AB opinion under the TBT chapter, the proposal would still be subject to challenge by Canada and Mexico under the provisions of the GATT 1994 agreement and those countries would likely prevail.⁵³ Both the Panel and the AB declined to review the GATT claims for reasons of judicial economy.⁵⁴ Once it was determined that the COOL measure violated TBT Article 2.1 (and Article 2.2 in the case of the Panel's decision), the bodies declined to consider the remaining claims. However, had the legal analysis been completed, the COOL measure would have been found to violate the general commitments against trade protectionism under these articles. In their appeal to the Appellate Body, both Canada and Mexico requested this analysis be completed for this very reason.

A *prima facie* case has been established for a claim by Canada and Mexico under GATT III: 4 because COOL treats imported like products less favorably than domestic products.⁵⁵ The test used to determine whether a national treatment discrimination claim can move forward under this provision is the same detrimental impact test the Panel and the AB utilized in the TBT Article 2.1 analysis. Because

⁵³ GATT 1994: General Agreement on Tariffs and Trade 1994, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, Chapter III:4, THE LEGAL TEXTS: THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS 17 (1999), 33 I.L.M. 1153 (1994) [hereinafter GATT].

⁵⁴ *Id.* at 493; Panel Reports, United States – Certain Country of Origin Labeling (COOL) Requirements, WT/DS384/R, WT/DS386/R, circulated to WTO Members 18 November 2011, at p. 213.

⁵⁵ GATT III:4 states: “The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favorable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use. The provisions of this paragraph shall not prevent the application of differential internal transportation charges which are based exclusively on the economic operation of the means of transport and not on the nationality of the product.”

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the Panel and the AB both found that there is detrimental impact to foreign producers resulting from the COOL measure, that finding establishes the *prima facie* claim of national treatment discrimination under GATT III: 4 as well.

Furthermore, the only defenses to GATT III:4 claims are prescriptively listed in GATT XX, which the U.S. has not raised in the WTO actions to date and are not applicable to the COOL measure.⁵⁶ The exceptions are prescriptively itemized in the GATT text and do not offer the same flexibility as the more general exceptions allowed under the TBT chapter, specifically the “consumer information” exception. Even assuming, *arguendo*, that the proposal would bring COOL into compliance with the AB’s opinion under both TBT Article 2.1 and 2.2, Canada and Mexico still have a solid legal claim against COOL under the GATT provisions, which simply have not been considered by the WTO bodies to date. The only way to prevent one of these claims from moving forward is to revisit the COOL statute and restructure it so as to remove the national treatment discrimination.

In short, the proposal would not bring COOL into compliance with the United States’ WTO obligations. The discrimination and detrimental impact to foreign producers resulting from COOL are the result of the statutory language and for that reason a regulatory change will do nothing to remedy this fundamental problem. Furthermore, the proposed changes to the labeling structure and elimination of comingling flexibility do not resolve the disproportionate informational imbalance placed on upstream producers. In fact, the proposal would intensify the imbalance that already exists under the current COOL standards by increasing the burdens on upstream suppliers. Finally, the regulations do not address any of the problems COOL faces under TBT Article 2.2 and GATT III:4 challenges. Therefore, to implement a rule that is fundamentally flawed and subject to future scrutiny by the WTO, especially when taking into consideration the negative economic impact it will have on U.S. companies and livestock producers is reckless and irresponsible.

The Proposal Violates the First Amendment Because it Impermissibly Compels Commercial Speech.

The proposal violates the First Amendment rights of U.S. retailers and packers of muscle cut covered commodities because AMS has not articulated an interest sufficient to justify the rule’s “Born, Raised, and Slaughtered” labeling provisions, which compel commercial speech.

⁵⁶ Examples of the exceptions found in GATT XX included protections for human and animal health, public morals, exhaustible natural resources, and domestic supply-management systems. They do not include an exception based on consumer information, as is found in the TBT decisions. See *GATT 1994, Chapter XX*.

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The First Amendment protects the freedom of public expression, as well as the “concomitant freedom *not* to speak publicly.”⁵⁷ The Amendment’s protections have been held to apply to commercial speech and to shield it from “unwarranted governmental regulation.”⁵⁸ To be lawful, restrictions on commercial speech typically must survive a four-prong test articulated in *Central Hudson Gas & Electric Corporation v. Public Service Commission of New York*:⁵⁹

- (1) determine whether the commercial speech at issue is protected by the First Amendment—*i.e.* the speech must concern lawful activity and cannot be misleading;
- (2) ask whether the asserted governmental interest is substantial;
- (3) if so, determine whether the regulation directly advances the asserted governmental interest; and
- (4) whether the regulation is more extensive than necessary to serve that interest.⁶⁰

In *Central Hudson*, the Supreme Court invalidated a complete ban on advertisements promoting electricity because the ban, which was imposed during a fuel shortage and advanced the state’s purported interests in energy conservation, was far more extensive than necessary.⁶¹ In *International Dairy Foods*, a case with facts analogous to COOL labeling, the United States Court of Appeals for the Second Circuit applied the *Central Hudson* test to a Vermont state law requiring milk or milk products containing Bovine Somatotropin (rBST) to be labeled as such.⁶² In that case, the court rejected the government’s argument that “strong consumer interest and the public’s right to know” justified compelled labeling of products with rBST.⁶³ Specifically, the Second Circuit said that “Vermont ‘does not claim that health or safety concerns prompted the passage of the Vermont Labeling

⁵⁷ *Harper & Row Publishers, Inc. v. Nation Enter.*, 471 U.S. 539, 559 (1985) (citation and internal quotations omitted).; *see also United States v. United Foods, Inc.*, 533 U.S. 405, 410 (2001) (“Just as the *First Amendment* may prevent the government from prohibiting speech, the Amendment may prevent the government from compelling individuals to express certain views. . . .”) (citations omitted).

⁵⁸ *See Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of New York*, 447 U.S. 557, 561-63 (1980) (citing *Va. Pharmacy Bd. v. Va. Citizens Consumer Council*, 425 U.S. 748, 761-62 (1976)); *see also Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 651 (1985) (explaining that disclosures of factual and uncontroversial information are considered purely commercial speech, and are distinguishable from opinions or political messages).

⁵⁹ 447 U.S. at 566.

⁶⁰ *See Id.*; *see also Int’l Dairy Foods Assoc. v. Amestoy*, 92 F.3d 67, 72-73 (2d Cir. 1996).

⁶¹ 447 U.S. at 568-71.

⁶² 92 F.3d at 69-70.

⁶³ *Id.* at 73.

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Law," but instead defends the statute on the basis of "strong consumer interest and the public's 'right to know'" ⁶⁴ The court held that the purported interest in public information was "insufficient to justify compromising protected constitutional rights." ⁶⁵

In certain cases, laws compelling the disclosure of "purely factual and uncontroversial" information are subjected to the less rigorous "rational basis" test, which asks whether the required disclosure is "reasonably related to the asserted governmental interest." ⁶⁶ This test was first applied to commercial disclosures by the Supreme Court in *Zauderer v. Office of Disciplinary Counsel*, and has been applied in cases challenging compelled disclosure laws aimed at preventing known risks, such as consumer deception or health, safety, and environmental dangers. ⁶⁷

The rationale in such compelled disclosure cases is that the "mandated disclosure of accurate, factual, commercial information does not offend the core *First Amendment* values of promoting efficient exchange of information," but rather furthers the "goal of the discovery of truth" and protects the "robust and free flow of accurate information." ⁶⁸ For example, *Zauderer* involved a state law requiring attorneys to make certain disclosures in advertisements for legal services, including defining representation on a contingent-fee basis. ⁶⁹ The Court upheld the contingent-fee disclosure because it was "reasonably related" to the asserted governmental interest of preventing consumer deception. ⁷⁰ Similarly, in *National Electrical Manufacturers Association v. Sorrell*, the Second Circuit applied the rational basis test to a state law requiring "manufacturers of some mercury-containing products to label their products and packaging to inform consumers that

⁶⁴ *Id.*

⁶⁵ *Id.* (citations and internal quotation marks omitted). The circuit court further bolstered its holding by commenting that "we are aware of no case in which consumer interest alone was sufficient to justify requiring a product's manufacturers to publish the functional equivalent of a warning about a production method that has no discernible impact on a final product." *Id.* Indeed, the Second Circuit stated that manufacturers could not legally be required to disclose their products' rBST content without any indication that rBST has an impact on health, safety, or some other substantial government interest, and suggested that "those consumers interested in such information should exercise the power of their purses by buying products from the manufacturers who voluntarily reveal" the rBST in their products. *Id.* at 74.

⁶⁶ See, e.g., *Zauderer*, 471 U.S. at 650-51.

⁶⁷ See *id.*; *Nat'l Elec. Mfrs. Assoc. v. Sorrell*, 272 F.3d 104, 114 (2d Cir. 2001).

⁶⁸ See *Sorrell*, 272 F.3d at 114 (citing *Zauderer*).

⁶⁹ *Zauderer*, 471 U.S. at 651.

⁷⁰ *Id.*

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the products contain mercury and . . . should be recycled or disposed of as hazardous waste.”⁷¹ The court determined that the labeling law was valid because it was reasonably related to the state’s purported interest in reducing mercury pollution.⁷²

Where there is a failure to articulate a government interest that is served by a compelled disclosure, however, courts will follow *Central Hudson* rather than *Zauderer*. The Second Circuit so held in *Sorrell*. There, the court acknowledged that it declined to follow *Zauderer* in *International Dairy Foods* because the rBST disclosure requirement was supported by “no interest other than the gratification of ‘consumer curiosity’.”⁷³ In other words, the satisfaction of consumer curiosity is not a government interest. Therefore, the *Central Hudson* test is appropriate here as the only support AMS provided for the proposed COOL rule is that “there is interest by some consumers in the designation of the countries of birth, raising and slaughter on meat product labels.”⁷⁴

The proposal’s labeling requirements fall within the scope of the First Amendment because they force the disclosure of information, and the labels are commercial speech because the information to be provided is factual information about the supply chain of regulated meat products. The proposal fails the *Central Hudson* test because “consumer curiosity alone is not a strong enough state interest to sustain the compulsion of even an accurate, factual statement . . . in a commercial context” and because the government has not articulated a substantial interest justifying the new and burdensome “Born, Raised, and Slaughtered” labeling provision.⁷⁵

The ruling in *International Dairy Foods* is squarely on point with the issues raised by the proposal. The agency’s interest in requiring these new labeling provisions is not substantial because it amounts to mere “consumer curiosity.” The agency’s only justification for the proposed “Born, Raised, and Slaughtered” labeling is that the labels will provide additional information for consumers.⁷⁶ Indeed, the

⁷¹ *Sorrell*, 272 F.3d at 107, 115.

⁷² *Id.* at 115-16.

⁷³ *Id.* at 115, n.6 (distinguishing the mercury disclosure law in *Sorrell* from the rBST law in *International Dairy Foods* and noting that the court’s decision in *International Dairy foods* “was predicated on the state’s inability to identify a sufficient legitimate state interest).

⁷⁴ 78 *Fed. Reg.* 15647.

⁷⁵ *Int’l Dairy Foods Assoc.*, 92 F.3d at 74 (citations omitted).

⁷⁶ *Id.* at 15646. “Removing the commingling allowance allows consumers to benefit from more specific labels.” Numerous comments received on previous COOL rulemaking actions indicate that there is interest by some consumers in the designation of the countries of birth, raising and slaughter on meat product labels. Specifying the production step occurring in each country listed on meat labels as proposed in this rule could provide additional benefits by providing more specific information on which consumers can base their purchasing decisions. *Id.* at 15647.

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agency cannot even begin to quantify the extent to which consumers will actually benefit from this information.⁷⁷

Of particular interest with respect to the proposal is the *International Dairy Foods* court's comments about consumer interest and compelled speech. Specifically, the Second Circuit stated that

Were consumer interest alone sufficient, there is no end to the information that states could require manufacturers to disclose about their production methods. For instance, with respect to cattle, consumers might reasonably evince an interest in knowing which grains herds were fed, with which medicines they were treated, or the age at which they were slaughtered. Absent, however, some indication that this information bears on a reasonable concern for human health or safety or some other sufficiently substantial governmental concern, the manufacturers cannot be compelled to disclose it. Instead, those consumers interested in such information should exercise the power of their purses by buying products from manufacturers who voluntarily reveal it.⁷⁸

That paragraph is on all fours with the proposal and could be rewritten today by deleting the court's reference to the age at which the cattle were slaughtered and inserting instead the country in which they not only were slaughtered, but also where they were born and raised. Given the recent KSU and other research, there is considerable doubt that most consumers care much, if at all, about country of origin labeling. Indeed, a key KSU finding is that "typical U.S. residents are unaware of MCOOL and do not look for meat origin information."⁷⁹ Thus, the proposal improperly compels speech about which many consumers do not care.

Nor can AMS avail itself of any health or welfare argument. In *International Dairy Foods* the court noted that the Food and Drug Administration had affirmed the safety of rBST derived milk in concluding that there was no safety issue attendant to the compelled speech. Here, the agency itself has done that, repeatedly stating that COOL is not a food safety program:

⁷⁷ *Id.* (explaining that the proposed rule will provide consumers with information to inform their purchasing decisions).

⁷⁸ *International Dairy Foods* at 74 (Emphasis added).

⁷⁹ *Mandatory Country of Origin Labeling: Consumer Demand Impact* at 2.

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- “The COOL program is not a food safety program.”⁸⁰
- “As noted by the commenter, the intent of the law and this rule is to provide consumers with additional information on which to base their purchasing decisions. COOL is a retail labeling program and as such does not provide a basis for addressing food safety.”⁸¹
- “As previously stated, the COOL program is neither a food safety or traceability program, but rather a consumer information program. Food products, both imported and domestic, must meet the food safety standards of the FDA and FSIS. Food safety and traceability are not the stated intent of the rule and the COOL program does not replace any other established regulatory programs that related to food safety or traceability.”⁸²
- As discussed in the IRIA, mandatory COOL does not address food safety issues.⁸³

Moreover, even if a court determined that the government has a substantial interest in informing consumers in this manner, the proposed COOL rule still fails the *Central Hudson* test because the labeling provisions are more extensive than necessary. The proposed “Born, Raised, and Slaughtered” labeling requirements would unnecessarily saddle U.S. retailers and packers with the significant costs discussed above and provide more than the country of origin information envisioned by the statute.

Finally, even if a court followed *Zauderer* and *Sorrell*, and agreed that providing this particular information to consumers furthers a legitimate government interest, the proposed COOL rule would still be invalid because it fails the rational basis test. The “Born, Raised, and Slaughtered” labeling requirements simply are not reasonably related to the statutory purpose of providing country of origin information. For example, in *Sorrell*, there was a clear link between mercury labeling and the government’s interest in reducing mercury pollution—consumers were being informed about a product’s mercury content and the proper manner in which to dispose of the product. As noted above, the proposed requirements function as point of processing, not country of origin, labeling.

⁸⁰ 74 *Fed. Reg.* at 2670 (Emphasis added).

⁸¹ *Id.* at 2677 (Emphasis added).

⁸² *Id.* at 2679 (Emphasis added).

⁸³ *Id.* at 2682 (Emphasis added).

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Utilizing a similar analytical framework, the Due Process clause of the Fifth Amendment protects against federal government overreaching. The Supreme Court has established a “tripartite rubric” for analyzing due process challenges:

- (1) laws regulating fundamental rights, such as voting, are subject to strict scrutiny and must further a compelling state interest;
- (2) laws regulating certain important, though less suspect, rights, such as those related to gender, are subject to intermediate scrutiny and must serve an important state interest; and
- (3) all other laws, including “economic regulations,” are subject to “rational basis review,” and are not valid unless they bear some rational relation to a legitimate governmental interest.⁸⁴

While the rational basis test requires only that the government demonstrates a conceivable legitimate objective for the law at issue,⁸⁵ economic regulations that work to the detriment of a particular group or protect a “discrete interest group from economic competition” will not be upheld.⁸⁶ For instance, the United States Court of Appeals for the Sixth Circuit, in *Craigmiles v. Giles*, found that a state law requiring persons engaged in “funeral directing” to be licensed by a state board violated, among other things, the due process rights of certain casket retailers.⁸⁷

The proposal violates the due process rights of U.S. retailers and packers because the only interest AMS has articulated for the “Born, Raised, and Slaughtered” labeling provisions is that they provide consumers with additional information on which to base purchasing decisions. The agency, however, has not explained whether that interest is legitimate nor has AMS demonstrated any “rational relation” between the proposed rule and the interest. In addition, as

⁸⁴ See generally 16B. Am. Jur. 2d Constitutional Law § 965; see also *Craigmiles v. Giles*, 312 F.3d 220, 223-24 (6th Cir. 2002) (summarizing Supreme Court law on Due Process and Equal Protection analyses); *Carbon Fuel Co. v. USX Corp.*, 100 F.3d 1124, 1137-38 (4th Cir. 1996) (determining that the Coal Act was economic legislation and that it survived the rational basis test).

⁸⁵ 16B Am. Jur. 2d Constitutional Law § 965. Consequently, while the Supreme Court has struck down laws for failing to meet the rational basis test, each has involved some historically disadvantaged or unpopular group. See *Romer v. Evans*, 517 U.S. 620 (1996) (striking down state law prohibiting regulations to protect homosexuals from discrimination because no legitimate interest was served by preventing a group from seeking legal protections); *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432 (1985) (overturning local ordinance as applied to denial of permit for operating a home for the mentally disabled because mental disability had no connection to purported interest in limiting population density); *U.S. Dep’t of Agric. v. Moreno*, 413 U.S. 528 (1973) (invalidating statute that excluded households with unrelated individuals from food stamp program where law was aimed at preventing “hippie communes” from fraudulently receiving food stamps).

⁸⁶ See *Craigmiles*, 312 F.3d at 224 (citations omitted).

⁸⁷ *Id.* at 222-23.

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currently written, the proposal would impose a substantial economic cost on retailers and packers, who will be forced to purchase new equipment and/or alter their current business models to meet the rule's requirements. The additional cost is comparable to how the licensing requirement in *Craigsmiles* created burdensome hurdles to entering the casket retailer market, and weighs in favor of finding that the proposal violates the due process rights of U.S. retailers and packers. Thus, without further justification or explanation of the "rational relationship" between the proposed rule and consumers' interest in information, the proposal violates the due process rights of the U.S. retailers and packers subject to its requirements.

The Proposal is *Ultra Vires* and not Authorized by the Statute

"Every agency decision must be anchored in the language of one or more statutes the agency is charged to implement."⁸⁸ In determining whether an agency's regulation is permissible under its governing statute, courts typically rely on a two-step analysis that finds its origin in the landmark administrative law case, *Chevron v. Natural Resources Defense Council*.⁸⁹ In that case, the Supreme Court created a legal framework under which formal⁹⁰ attempts by agencies to give meaning to the statutes they administer are assessed. The *Chevron* Court explained:

First, always, is the question of whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.⁹¹

Thus, under the first prong of the *Chevron* analysis, if it is clear that Congress has resolved a particular policy dispute, an agency must adopt Congress's resolution as a matter of law.⁹² The test is whether the "agency's construction of the language is within the range of meanings that could be *plausibly attributed* to the relevant statutory language."⁹³ It is up to a reviewing court to "determine the existence or nonexistence, of ambiguity in the relevant language of an agency-

⁸⁸ Richard J. Pierce, Jr., *Administrative Law Practice* § 3.1 (4th ed. 2002).

⁸⁹ 467 U.S. 837 (1984).

⁹⁰ Under the Supreme Court's ruling in *Christensen v. Harris County*, 529 U.S. 576 (2000), the application of *Chevron* applies to formal adjudications and notice-and-comment rulemaking.

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administered statute.”⁹⁴ Only when it is evident that Congress did not itself resolve the particular policy issue, an interpreting agency has the power to resolve the particular policy issue.⁹⁵

It is fair to conclude that Congress understood that animal agriculture is complex and that Congress intended that the statute be interpreted in a flexible manner. To that end, a fundamental purpose of the 2008 Farm Bill provisions that amended COOL’s statutory language was to address the overly prescriptive concepts set forth in the agency’s original 2003 proposed rule – a proposed rule that virtually mirrors the March 2013 proposal. As the discussion below articulates, requiring the production steps to be declared for each muscle cut covered commodity is at odds with the language in the statute and flies in the face of Congressional intent to provide greater, not less, flexibility and thereby eliminating some the cost discussed above.

A. The Statute Does Not Explicitly or Implicitly Allow the USDA to Require Retailers to Provide Point of Processing Information

Applying *Chevron*, its progeny, and the tools of statutory construction to the matter at hand, the 2008 COOL statute does not allow the USDA to require retailers to provide labels that contain point of processing information as to where the source animals were born, raised and slaughtered. There is simply no text in the statute that allows the USDA to mandate that all labels for muscle cut commodities identify the points of production.

Further, there is no provision in the statute delegating to the USDA any broad, implied grants of authority to allow it to require retailers to provide such labels. This case is unlike the Supreme Court case, *Pension Benefit Guaranty Corp. v. LTV Corp.*,⁹⁶ where Congress specifically allowed the PBGC to restore terminated

⁹¹ 467 U.S. at 842-43.

⁹² *Pierce*, § 3.3.

⁹³ *Pierce*, § 3.6 (emphasis added).

⁹⁴ *Id.*

⁹⁵ *Pierce*, § 3.3.

⁹⁶ 496 U.S. 633, 648 (1990). In this case, the court held that even where a statute does not particularly prohibit an agency from enacting a certain set of rules, an agency may typically only do so when there is textual evidence of a *broad* grant of authority. The court noted that “the textual grant of authority to the PBGC embodied in this section is broad . . . [] the section authorizes the PBGC to restore terminated plans “in any such case in which [the PBGC] determines such action to be appropriate and consistent with its duties under [Title IV of ERISA].” Thus, the court upheld the PBGC’s policy to reallocate to firms billions of dollars of liability of pension plans terminated through bankruptcy, even though the statute did not explicitly authorize it to restore plan liabilities by using a particular method: using follow-on plans. There had to be “clear congressional intent” to preclude the agency from adopting its “permissible” construction of the statute.

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plans “*in any such case* in which [the PBGC] determines such action to be appropriate and consistent with its duties under [Title IV of ERISA].” There is no evidence of such broad grants of authority with respect to the labeling regime anywhere in the 2008 COOL statute.

Statutory language giving the USDA explicit or implicit authority to mandate a particular labeling scheme cannot be found in the 2008 COOL statute because Congress intended the statute to require the USDA to impose a mandatory “country of origin” labeling scheme, not a “point of processing” labeling scheme. If Congress had intended the latter, it would have employed such statutory language. Such language or congressional intent is simply not present in the COOL statute. To illustrate, subsection (a)(1) of the COOL statute, which sets out general requirements, reads that the “retailer of a covered commodity shall inform consumers . . . of the *country of origin* of the covered commodity.”⁹⁷ The COOL statute goes on to require “country of origin” labeling for Category A, B, C, and D commodities.⁹⁸ There is simply no mention of requiring point of processing labeling anywhere in the statute.

In fact, when the House Agriculture Committee convened to reach a compromise between the various interested parties on July 20, 2007 to consider what eventually became the 2008 COOL amendments, the primary impetus behind the discussions was to do away with the USDA’s proposed scheme to turn the country of origin labeling scheme into a point of processing labeling scheme.⁹⁹ During the Senate’s consideration of the COOL amendments, Senator Tim Johnson explained how the amendments came as a direct response to the USDA’s “botched” rule:

As the author of the COOL provision included in the 2002 farm bill, I am pleased to see that this bill contains a very critically important compromise on mandatory Country of Origin Labeling, COOL, that

⁹⁷ 7 U.S.C. § 1638a(a)(1).

⁹⁸ For a Category A commodity, “[a] retailer . . . may designate the covered commodity as exclusively having a United States *country of origin* . . .” For a Category B commodity, “[a] retailer . . . may designate the *country of origin* . . .” For a Category C commodity, “[a] retailer . . . shall designate the *origin* of such covered commodity as—(i) *the country* . . .” For a Category D commodity, “[a] retailer shall designate a country other than the United States as the *country of origin* . . .” 7 U.S.C. § 1638a(a)(2)(A)-(D). The statute goes on to require just “country of origin” for other commodities covered under the statute.

⁹⁹ The following is the only record of the compromise proceedings we have found: “During consideration of H.R. 2419, the Committee was presented with a list of items that were agreed upon by the various interested parties. The list included suggestions to improve the statute with regard to issues including product labels, records, and record-keeping. With regard to product labeling, the Committee adopted amendments to Section 281 of the Agricultural Marketing Act of 1946 that would establish four categories of country of origin labels for meat. The legislative language outlining these categories is self-explanatory.” 153 Cong. Rec. 21,120 (2007).

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will allow for streamlined, commonsense implementation, which is *something that the USDA has been unable to accomplish* in the 5-plus years since the enactment of the 2002 farm bill. *The USDA has mercilessly botched the rulemaking process* on this consumer right-to-know and producer marketing program, promulgating unworkable regulations that would burden farmers and ranchers as well as retailers. The COOL compromise language included in the committee version of the farm bill, which was passed unanimously by that body, allows, for example, for the use of records for origin verification which are part of daily business, in addition to allowing State, region or locality of the United States information as being sufficient to identify the United States as the point of origin. These implementation guidelines are important to ensure that producers or retailers are not saddled with unnecessary costs or recordkeeping burdens that the USDA would have preferred, and that we can deliver a program that in excess of 91 percent of American consumers want.¹⁰⁰

Congress's intent to do away with the USDA's flawed interpretation of the statute is further made evident through the memoranda submitted by the interested parties around the relevant timeframe. For example, the very first item on R-Calf United Stockgrowers of America's memorandum providing a list of proposed changes to the statute was to request that the rule be changed to "no longer require that additional specific information on every production step processed in the U.S. to be labeled."¹⁰¹

Moreover, it is instructive that after the adoption of the COOL amendments in the 2008 Farm Bill, the USDA promptly retreated from its earlier position and published proposed regulations that no longer required all retailers to provide specific information as to where the source animals of covered commodities were born, raised and slaughtered. Thus, it becomes even more evident that Congress enacted the amendments to the COOL statute to mandate a true "country of origin" labeling regime, and not a "point of processing" labeling regime, and USDA correctly interpreted as such. Barring a modification to the 2008 COOL statute itself, there is no statutory basis for the USDA to issue regulations that would once again seek to require labels to provide specific information as to where the source animals of covered commodities were born, raised and slaughtered.

¹⁰⁰ 153 Cong. Rec. 15,622-41 (statement of Sen. Tim Johnson) (2007) (emphasis added).

¹⁰¹ Memorandum from R-Calf USA to USDA, R-Calf USA Comments Regarding *Mandatory Country-of-Origin Labeling for Beef, Lamb, Pork, Perishable Agricultural Commodities, and Peanuts*, 2 (Aug. 20, 2007).

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B. The Statute Provides that the Labels Must Identify Category C Commodities as the Country From Which the Animal was Imported And the United States

The proposed changes to require the identification of the individual processing steps are incompatible with the statutory requirements for Category C commodities (those from animals “imported for immediate slaughter”). For Category C commodities, the 2008 COOL statute explicitly provides that retailers *shall* identify only the country from which the animal was imported and the United States.¹⁰² The current regulations accurately reflect the text of the statute by requiring commodities derived from animals imported into the United States for immediate slaughter¹⁰³ to be “designated as Product of Country X and the United States.”¹⁰⁴

The proposed changes, if implemented, would circumvent this statutory requirement. In effect, the proposed change seeks to substitute “country from which the animal was imported” with the “country[ies] where the animal was born and raised.”¹⁰⁵ While the 2008 COOL statute does not define the terms “import” or “country of import” in its separate “definitions” section that sets forth and defines some of the key terms in the statute, it is clear from a plain reading of the statute that the two phrases—“country from which the animal was imported” with the “country[ies] where the animal was born and raised”—are not interchangeable. An animal can be raised in one country, transferred to another country, and then imported into the United States immediately thereafter. In such a scenario, the “country in which the animal was raised” is clearly not the equivalent of the “country from which the animal was imported.”

¹⁰² The relevant provision of the 2008 COOL statute provides: (C) IMPORTED FOR IMMEDIATE SLAUGHTER.—A retailer of a covered commodity that is beef, lamb, pork, chicken, or goat meat that is derived from an animal that is imported into the United States for immediate slaughter shall designate the origin of such covered commodity as—(i) the country from which the animal was imported; and (ii) the United States. 7 U.S.C. § 1638(a)(2)(C) (2010).

¹⁰³ As defined under 7 C.F.R. § 65.180 (2013).

¹⁰⁴ 7 C.F.R. § 65.300(e)(3) (2013) (“If any animal was imported into the United States for immediate slaughter as defined in § 65.180, the origin of the resulting meat products derived from that animal shall be designated as Product of Country X and the United States.”).

¹⁰⁵ The agency noted in the *Federal Register* that “the country of raising for animals imported for immediate slaughter as defined in § 65.180 shall be designated as the country from which they were imported (e.g., ‘Born and Raised in Country X, Slaughtered in the United States’).” Mandatory Country of Origin Labeling, 78 *Fed. Reg.* at 15,646 (Mar. 12, 2013).

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Further, the 2008 COOL statute identifies the “country from which the animal was imported” as a “country” in the singular, and not in the plural, “countries,” because any one animal cannot be imported from more than one country.¹⁰⁶ On the other hand, an animal can be *raised in multiple countries*. Courts have recognized similar singular-plural distinctions in matters involving similar exercises of statutory construction to carry significant persuasive value.¹⁰⁷ Additionally, according to Webster’s Dictionary,—a source courts often find to be a “reputable” tool of statutory interpretation—“to import” means to “bring from *a* foreign or external source.”¹⁰⁸ The agency’s attempt to substitute the “country where the animal was raised” for “country from which the animal was imported” would be an interpretation that cannot be plausibly attributed to the statutory language provided in the 2008 COOL statute.

Similarly, with respect to Category D, the 2008 COOL statute makes it clear that retailers shall designate covered commodities that are derived from an animal that is not “born, raised, or slaughtered” in the United States, as “a country” other than the United States as the country of origin.¹⁰⁹

C. Applying the “Whole Statute Rule,” Category A and Category B Commodities Must Be Labeled in the Same Manner as Category C and Category D Commodities

If Congress made it clear that Category C and D commodities are to be labeled in a particular manner, it is apparent that, absent clear evidence to the contrary, Congress intended Category A and B commodities to be labeled in a consistent manner. The “whole statute” or the “whole act” rule of statutory interpretation provides that courts should consider statutory text in relation to

¹⁰⁶ In contrast, when the need arises, the statute uses the plural. For example, the statute uses “all of the countries” with respect to Category B commodities.

¹⁰⁷ See, e.g., *United States v. Rowland*, 464 F.3d 899, 906 (9th Cir. 2006) (“[I]tem must come from *a* foreign country to be imported.”) (Emphasis added); *Sec’y of Labor v. Excel Mining, LLC*, 334 F.3d 1, 9 (D.C. Cir. 2003) (recognizing the validity of the Secretary’s argument that a singular term, “measurement,” was deliberately used to signify the taking of a single as opposed to multiple samples); *Bldg. & Constr. Trades Dep’t v. Reich*, 40 F.3d 1275, 1283 (D.C. Cir. 1994) (dissenting) (interpreting the statute’s plain language to recognize a distinction between ‘contractor or his subcontractor’ in the singular, not contractors or subcontractors in the plural.”).

¹⁰⁸ See Webster’s Dictionary, Definition of IMPORT #2, <http://www.merriam-webster.com/dictionary/import>. Through the use of an example, Webster’s further confirms that the country of import can only be one country “to bring (as merchandise) into a place or country from another country.” Webster’s, Examples of IMPORT, <http://www.merriam-webster.com/dictionary/import> (emphasis added).

¹⁰⁹ 7 U.S.C. § 1638(a)(2)(D) (2010).

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other provisions of the statute.¹¹⁰ When interpreting a statute, courts are free to look to other provisions of the statute because statutes are typically adopted and construed as a single entity, and its various provisions are typically designed to work together.¹¹¹ Thus, even “[a] provision that may seem ambiguous in isolation [can be] clarified by the remainder of the statutory scheme.”¹¹² “[I]t is not proper to confine interpretation to the one section to be construed.”¹¹³

The statutory language with respect to Category A and Category B products is not a model of clarity. Category A of the 2008 COOL statute provides, in relevant part, that “[a] retailer of a covered commodity . . . may designate the covered commodity as exclusively having a United States *country of origin*”¹¹⁴ Category B of the 2008 COOL statute provides, in part, that “[a] [r]etailer of a covered commodity . . . [m]ay designate the country of origin of such covered commodity as *all of the countries* in which the animal may have been born, raised, or slaughtered.”¹¹⁵ However, as discussed in the preceding section, the statute is clear as to what is required for Category C and D commodities. Retailers must label commodities imported for immediate slaughter as: the country from which the animal was imported and the United States; and covered commodities that are derived from an animal that is not “born, raised, or slaughtered” in the United States, as “a country” other than the United States.¹¹⁶ Thus, to maintain consistency throughout the entire statute, the reasonable inference is that Category A and Category B commodities be labeled consistently with Category C and Category D commodities.

Indeed, in the two prior instances where USDA proposed regulations to administer the COOL statute, it mandated that the form of the labeling regimes be consistently applied to *all* muscle cut commodities governed by the statute. In 2003, the USDA mandated that retailers “provide country of origin information, including the ‘born, raised, and slaughtered’ information” on the labels of all muscle cut commodities.¹¹⁷ Under the current regulations, retailers are required to provide country of origin labeling that is “in the form of a statement such as ‘Product of USA,’ ‘Produce of the USA,’ or ‘Grown in Mexico’” to commodities of *all four* Categories.¹¹⁸ Thus, there is no reason to suggest that country of origin labels

¹¹⁰ Singer & Singer, *Sutherland Statutes and Statutory Construction* § 46:5 (citing *Gustafson v. Alloyd Co., Inc.*, 513 U.S. 561 (1995)).

¹¹¹ *United States v. Cooper*, 396 F.3d 308 (3d Cir. 2005).

¹¹² *United Sav. Ass’n of Tex. v. Timbers of Inwood Forest Assocs.*, 484 U.S. 365, 371 (1988).

¹¹³ *United States v. Universal C.I.T. Credit Corp.*, 344 U.S. 218 (1952).

¹¹⁴ 7 U.S.C. § 1638(a)(2)(A) (2010) (emphasis added).

¹¹⁵ 7 U.S.C. § 1638(a)(2)(B) (2010) (emphasis added).

¹¹⁶ 7 U.S.C. § 1638(a)(2)(C), (D) (2010).

¹¹⁷ Mandatory Country of Origin Labeling, 68 *Fed. Reg.* at 61,944 (Oct. 30, 2003).

¹¹⁸ 7 C.F.R. § 65.300 (2013).

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should no longer be consistent with one another for all muscle cut commodities covered under the statute. Category A and Category B commodities must be labeled in the same manner as Category C and Category D commodities.

If the Agency Promulgates a Final Rule as Proposed, Implementation Should be Delayed.

AMI has demonstrated the severe adverse impact the proposal would have on the meat industry if AMS moves forward with the rulemaking and for those various reasons the proposal should be withdrawn. If, however, the agency moves forward and promulgates a final rule as proposed or similar in nature to the proposal, the agency should not make the rule effective until the WTO has had an opportunity to determine whether the rule developed by AMS satisfies the United States WTO obligations.

Presuming the proposal becomes a final rule, it is clear that the Canadian and Mexican governments will take the steps necessary in the WTO Dispute Settlement process to decide whether that final rule is compliant. Delaying the effective date of the final rule cannot harm either industry or consumers. While AMI in its comments above has shown the costs and burdens of the proposal to be significant, the agency admits the benefits of the rule will be small.¹¹⁹

Implementing any final rule before knowing whether the WTO considers the proposal to be compliant, however, would impose significant costs on the entire meat and poultry sector – costs, including companies that would close and the lost jobs attendant to those closures, that can never be recovered.

* * * * *

One of the agency's key missions, if not its primary mission, is to help support and grow American agriculture. It is difficult to envision how the agency is fulfilling that mission when it proposes a rule that, if implemented, will: 1) offer *de minimis*, if any, benefits; 2) add significant costs to meat products processed in the United States, thereby decreasing demand; 3) likely cause packing plants and livestock producers to close or go out of business; 4) adversely affect the United States' ability to compete in international markets, and 5) adversely affect the

¹¹⁹ In 2009 AMS stated that "after reviewing many studies and comments, the economic benefits from COOL will be small and will accrue mainly to those consumers who desire country of origin information." 74 *Fed. Reg.* 2681 (Jan. 15, 2009) (Emphasis added). The benefits, which AMS cannot quantify, are now even smaller: "The Agency believes that the incremental economic benefits from the proposed labeling of production steps will be comparatively small relative to those that were discussed in the 2009 final rule." 78 *Fed. Reg.* 15646 (Emphasis added.)

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unique business relationship the United States with its two largest trading partners. Accordingly, for the reasons discussed above, AMI respectfully requests that the proposal be withdrawn.

The American Meat Institute appreciates the opportunity to submit these comments. If you have any questions regarding the information provided in these comments or anything else regarding this issue, please contact me.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Mark Dopp', with a long horizontal flourish extending to the right.

Mark Dopp Senior Vice President,
Regulatory Affairs and General Counsel

cc: Patrick Boyle
Dale Nellor
Janet Riley
Bill Westman
Jim Hodges
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Attachment A



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The Honorable Ann Veneman
Secretary, U.S. Department of Agriculture
Country of Origin Labeling Program
Agricultural Marketing Service
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Delivered by email to cool@usda.gov

Re: Comments on Guidelines for Voluntary Country of Origin Labeling Program

Dear Secretary Veneman:

Sparks Companies, Inc. (Sparks) and Cattle Buyers Weekly (CBW) are pleased to submit the attached document in response to your request for comments on the U.S. Department of Agriculture's Guidelines for the Interim Voluntary Country of Origin Labeling of Beef, Lamb, Pork, Fish, Perishable Agricultural Commodities and Peanuts. This work was conducted on behalf of the Sparks/CBW COOL Consortium.

As interested food industry participants, Sparks and CBW are concerned about the costs, impacts and potential unintended consequences that Country of Origin Labeling will have on the industries producing covered products. The analysis being submitted provides a detailed assessment of potential cost burdens that could occur based on our interpretation of the current voluntary guidelines as published by the USDA.

Sincerely,

Richard S. Andersen
Senior Vice President
Sparks Companies Inc.

Steve Kay
Editor and Publisher
Cattle Buyers Weekly



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COOL COST ASSESSMENT

**PREPARED FOR THE
SPARKS/CBW COOL CONSORTIUM**

April 2003

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The information, data and industry cost estimates contained herein have been developed from industry sources and proprietary industry data that we believe to be reliable. Sparks Companies, Inc. (Sparks) and Cattle Buyers Weekly (CBW) do not guarantee that such information is accurate or complete, however, and it should not be relied upon as such. Opinions expressed reflect judgments at this date and are subject to change without notice. This material was developed for the Sparks/CBW COOL Consortium and is being submitted to the USDA in response to an invitation for comments regarding the proposed implementation guidelines for Country of Origin Labeling.

I. SUMMARY AND KEY FINDINGS

Country of origin labeling (COOL) is a two-phase labeling program authorized in the 2002 Farm Bill that is intended to specifically identify domestic and imported food products at the retail consumer contact point. In its first phase, the program is voluntary. However, by September 30, 2004 the law requires labels and records to support them throughout each vertical supply chain. As an example of the coverage to be imposed, retailers, at the final point of sale, must label all covered products with specific country of origin information and they must be able to verify label claims using an auditable record for each product. Covered products span several major food supply chains, including cattle/beef, hogs/pork, fish and seafood, produce (fruits & vegetables), lamb and peanuts **but not poultry**.

COOL requirements assign substantial risk of violations and penalties throughout the system. To avoid these will necessitate many changes in current business processes and the development of new tracing and record-keeping systems for the impacted product supply chains. To support any claim by retailers regarding country of origin, all segments in the supply chain will need to develop and execute a system for gathering, storing and communicating information and data pertinent to the origin of all covered products moving through each supply chain. In addition to the substantial information and record-keeping requirements, there are requirements to segregate product to assure accurate and verifiable identification at retail. Meeting those requirements will be difficult because there are no industry or government standards or definitions to satisfy all the complex requirements necessary to satisfy the origin labeling law.

Due to the complexity and extent of the COOL requirements, identification of their eventual implementation costs has varied widely. Sparks' efforts have focused primarily on the beef and pork supply chains but estimates have been developed as well for the fish/seafood and produce supply chains. No attempt was made to develop costs for the peanut industry or the sheep/lamb industry even though these supply chains will also be impacted by the labeling legislation.

Cattle and Beef

Table 1 provides a detailed summary of estimated COOL costs for the beef supply chain. Several segments of the beef supply chain are identified and costs for each segment are provided on a per head basis as well as on a total industry basis. Key conclusions from the analysis are:

- Costs for the cattle and beef industry are enormous, with per head costs estimated to total in the \$50 per head range. The cost burden is primarily due to the likelihood that individual animal identification will need to be implemented due to significant commingling of Canadian and Mexican feeder cattle and calves with US origin animals at the lower end of the chain, as well as integration of Canadian fed cattle at the slaughter stage and imported beef (primarily from Canada, Australia and New Zealand) at the processing stage of the supply chain.
- For the industry in total, it is estimated that the annual cost to satisfy COOL requirements will range from \$1.5 billion to \$1.7 billion.

- All production stages of the beef supply chain will experience a significant cost burden, ranging from \$198 million dollars for the cow-calf and back-grounding segment to an estimated \$110-170 million at the feedlot level.
- Costs for the packer/processor segment exceed those of the live animal owners because packers will incur huge costs for segregating beef products during the slaughter and fabrication stage of production.
- Costs at the retail distribution and retail store level nearly match the aggregated costs for the remainder of the supply chain and are estimated at \$23 per head or roughly \$800 million.

Table 1**BEEF SUPPLY CHAIN COOL COST ESTIMATES**

	\$/Head	Segment Cost (Million \$)	Calculation Process
Cow-Calf Producer, Backgrounders	\$4.88	\$198.0	38 Million Head Calf Crop 2.5 Million Head Imports
Feedlot	\$3.75-5.75	\$109-\$167	29 Million Head Sold
Packer/Processor	\$15-18 \$4*	\$435-522 \$24	29 Million Head Steer/Heifer 6 Million Head Cows/Bulls
Retail Distribution and Retail Store	\$23	\$805	8 Billion lbs. sold @ 10 cents/lb from 35 Million Cattle
TOTAL	\$47.13- \$51.63	\$1,571- \$1,716	

* Not included in total per head cost

Hogs and Pork

Due to the structural nature of the pork supply chain, the Source, Materials, Process, Verification (SMPV) System (a .k. a traceability) needed to meet COOL requirements at the retail level for pork products has less overall complexity than for beef. Consequently, the costs of compliance are likely to be lower. A large portion of the pork industry is vertically integrated. Even in the non-integrated segment of the industry, significant concentration of production, packing and processing has occurred. The existence of large, closed hog production systems where only US hogs are born and raised suggests that individual animal identification for a large part of the hog industry is likely not needed as commingling of foreign origin animals with US origin animals does not and cannot occur. This is not the case for all hogs produced, however, so it is likely that pork supply chain costs will be highly variable depending on the specific construct of the production system utilized. Key cost estimates for the pork supply chain are provided in Table 2 along with the following primary findings.

- The US hog industry has undergone significant structural change in the past twenty years. The integrated business model has grown in importance to the point where more than one-quarter of all hogs produced come from fully integrated systems.
- Integrated hog production systems already have in place animal segregation and the costs associated with verifying these systems as to country of origin (all US) will be minimal.
- It is estimated that a vertically integrated hog production/slaughter/processing system will face per head costs of \$.50 to origin identify their product into processed pork boxes ready to ship to retail customers.
- Other components of the hog production sector are also highly concentrated and produce hogs in closed/confined production systems. These producers will likely benefit from their business structure in terms of being able to provide verification of origin on all hogs flowing from their facilities. Many of these hogs will probably not need to be individually identified. These hogs will not fully capture the cost savings at the packer/processor level, however, as they will be vulnerable to commingling with hogs from other country origins at the packing plant.
- For that portion of the US hog production base that is exposed to multiple hog ownership and transactions, there will likely be the need for individual animal identification and animal/product segmentation at the packing facility. Costs for such a business model are significant.
- It is estimated that for the non-integrated segment of the hog industry, COOL costs at the producer level will range from \$.75 per head to \$1.50 per head.

Table 2**PORK SUPPLY CHAIN COOL COST ESTIMATES**

	\$/Head	Segment Cost (Million \$)	Calculation Process
Integrated Hog Production and Packer/Processor System	\$0.50	\$12.5	25 Million Hogs per Year
Retail Distribution and Retail Store	\$2.75		
Total Integrated System	\$3.25		
Large Scale Closed Production System, Non-Integrated	\$.75	\$18.75	25 Million Head per Year
Small Independent Non-Integrated Production System	\$1.50	\$67.5	45 Million Head per Year
Non-Integrated Packer/Processor	\$2.00-6.00	\$146-\$438	73 Million Head per Year
Retail Distribution and Retail Store	\$2.75		
Total Non-Integrated System	\$5.50-10.25		
Sows and Boars	\$2.00	\$6.0	3 Million Head per Year
Retail Distribution and Retail Store		\$263	3.5 Billion lbs. sold @ 7.5 cents/lb from 95 Million Hogs
TOTAL	\$3.25-\$10.25	\$513.75-\$805.75	

- Costs for the non-integrated packer/processor will be subject to wide variances estimated from \$2-6 per head.
- Identification of product moved into the retail distribution system and then on to the store level by country of origin will be required. The costs are put at 7.5 cents per pound of covered pork product sold. This translates to a \$2.75 per head cost for product moving through retail distribution and sales at the retail store level.
- Total costs for the pork system to comply with COOL range from a low of \$3.25 per head to a high of \$10.25 per head for all butcher hogs sold. This will mean a total cost burden to the industry of approximately \$500-800 million.

Fish and Seafood

Table 3 provides a summary of expected COOL compliance costs for the fish and seafood industry. There will be multiple challenges for the fish and seafood supply chain in order to meet anticipated requirements for COOL. Because a large percentage of fish and seafood consumption in the US is of foreign origin, the current supply chain already has in place procedures for identifying and formalizing the information exchange to satisfy COOL. Commingling of US and imported product does occur for some processors and products but the degree of new segregation required will not be nearly as burdensome as is the case in the beef sector.

- A review of the supply chain and an assessment of current operating and product identification systems suggests that compliance costs at the product level for wild catch and fish farms will be relatively small; estimated at \$1 million/year.
- At the processor and fish wholesaler level, formalized tracking of invoices will need to occur and limited additional segregation of product will be required. Estimates suggest that at this segment of the chain, costs will be one-half cent per pound.
- Based on an estimated 2.9 billion pounds of fish and seafood being handled through the processing/wholesale segment of the chain, the cost will be \$15 million per year.

Table 3

Fish/Seafood COOL Cost Summary

	Cents/ Lb.	Segment Cost (Million \$)	Calculation Process
Producer: Wild Catch and Aquaculture		\$1.0	Minimal Cost for Wild Catch; Book Keeping Cost for 2100 Aquaculture Farms
Processor/Wholesaler	0.5	\$15.0	2.9 billion pounds
Retail Distribution	2-3	\$20-30	1.0 billion pounds
Retail Store	3-4	\$30-40	1.0 billion pounds
TOTAL COST	5-7.5	\$66-86	6.6-8.6 cents per pound sold

- Most of the costs for compliance with COOL will occur at the retail distribution facility and again at the retail store level. A thorough review of changes that will need to occur to scan all covered fish and seafood product in and out of the distribution center and to set up identification and book keeping processes to document the multiple products and multiple countries of origin indicated a major cost burden for the retailer.
- Estimates are that at the retail distribution center, a cost of 2-3 cents per pound will occur and another 3-4 cents per pound sold at the retail store level.
- Retail sales of fresh and frozen fish and seafood that would require COOL identification amounts to about 1 billion pounds per year so the cost burden at the retail level will be \$50-70 million.
- Total industry costs are expected to be \$66-86 million; well below the costs estimated for either the beef or pork industries but due primarily to the smaller volume of fish and seafood sold through the retail sector.

Produce

As with the fish/seafood supply chain, the produce industry currently incorporates multiple foreign origin products into US distribution. By the very nature of the production process, substantial volumes of US origin product are also currently identified as to their production location and if not, the process for doing so would be relatively simple. The costs for this identification would be primarily of a book keeping nature. For imported fruits and vegetables that are covered under the law, identification as to country of origin occurs as the product enters the US and since most of said product is segregated through the supply chain, costs will relate primarily to formalizing the audit trail on this product so that documentation at the retail level exists. Where COOL implementation appears to have its largest impact is at the retail distribution and store level of the supply chain. Systems are currently not in place to provide a rigorous segmentation and accounting of all of the product moving through to the produce case and costs of putting such a system in place and operating it will be large.

Table 4

Produce COOL Cost Summary

	Cents/Lb.	Segment Cost (Million \$)	Calculation Process
Producer/Grower	Small	\$20.0	Minimal Cost Mostly for Initial Identification and Book Keeping
Processor/Wholesaler	Small	\$34.0	Primarily Book Keeping
Retail Distribution	1-2	\$500-1000	50.0 billion pounds handled
Retail Store	2-4	\$1000-2000	50.0 billion pounds sold
TOTAL COST	3-6	\$1,554-3,054	

- Costs for COOL implementation at the producer/processor/wholesaler level of the produce supply chain are estimated at about \$50 million.

- As product enters retail distribution and requirements for specific identification and tracking of product occur over multiple products, costs increase to an estimated \$500-1,000 million.
- Segregation and identification of multiple products at the retail store level with accurate signage or package labeling will also be complex and time consuming with the cost at store level estimated to be \$1-2 billion.

Aggregate Food Industry Costs

- A summary of estimated costs across the four major supply chains analyzed result in an aggregate cost estimate for COOL implementation of **\$3.66 to \$5.6 billion**.
- The cattle/beef and produce supply chains will bear the brunt of the costs in terms of total dollars but costs for each segment are not insignificant.

Table 5

Food Industry COOL Cost Summary

Supply Chain	Segment Cost (million \$)
Cattle and Beef	\$1550-1725
Hogs/Pork	\$500-800
Fish/Seafood	\$60-90
Produce	\$1550-3000
TOTAL COST	\$3,660—5,615

Meat Industry Impacts

- Complexity of the beef supply chain and potential for foreign commingling of cattle at virtually every stage of the live animal segment of the supply chain suggests that to meet the requirements of COOL, **an individual animal identification system will be needed**.
- The COOL requirement will clearly create a **competitive cost advantage for the integrated segment** of the US pork industry.
- Higher costs for the cattle/beef supply chain relative to the pork chain creates a **competitive disadvantage for the beef industry**.
- Lower per pound costs for the **fish/seafood** industry relative to the red meats will create a **competitive advantage at retail** for this category.
- Significant implementation costs for COOL at retail relative to food service will create a **competitive advantage for the food service sector**.
- Given the exemption of poultry from the COOL requirement, the **red meat sectors will suffer competitive disadvantages** to the extent of the additional costs that occur because of COOL.
- Retailers and processors are concerned that some consumers may **alter their seafood consumption patterns** when they discover the origin of their seafood; this could be the largest cost/loss to the sector.

II. Study Objective

In the 2002 Farm Bill, a provision was included calling for the voluntary labeling of a defined set of “covered” products indicating Country of Origin for said products. This voluntary labeling program is to be followed by Mandatory Origin Labels for these products effective October 1, 2004. Much debate has already occurred regarding the requirements for implementing Country of Origin Labeling (COOL), and fragmented assessments of the cost to the US food industry to effectively implement COOL have been made public by various interested industry participants. USDA, through its Agricultural Marketing Service, issued an assessment of the cost associated with the “record keeping” requirements for implementation of this legislation. **But to date, an all-inclusive cost assessment of COOL has not been publicly tabled.**

The objective of this study is to provide a full food industry cost assessment for implementing COOL based on the preliminary guidelines for COOL as published by USDA in October 2002. Recognition should be made that at present, specific requirements have **NOT** been defined for COOL as it relates to the verification/audit requirements for retailers. Just how these audit requirements are defined at the retail/consumer contact level will impact supply chain data and information needs, and hence the costs of total supply chain compliance with the COOL legislation. Since there exists a high degree of uncertainty as to what the final rules and regulations will be, the cost assessment contained in this report (and particularly as it relates to the retail level) should be viewed as a highly plausible but most likely a “worst case” situation. Sparks has developed the cost assessment based on the premise that “the food supply chain, post-COOL implementation, will offer the same level of consumer choice that exists in today’s system”, with the only defining change being that the consumer will be able to identify the country of origin of products being offered in the retail store. In other words, supply chain status quo plus COOL identification at point of sale.

III. Defining the Issue

Much has been written about the COOL issue and much confusion and speculation has been generated. But we will refrain from entering into the debate as to whether the legislation is good or bad, needed or not needed. The fact remains that a law has been passed mandating certain requirements as it relates to COOL. The US agricultural and food industry needs to proceed on the expectation that the law will be implemented as written. The COOL legislation simply states that **consumers have the right** to be informed at the point of purchase where the covered products originated. The **retailer is required** under law to provide that information and to be able to “prove” that the information being disseminated to the consumer is true and accurate. The retailer is subject to fines of \$10,000 for failing to provide this information or for failing to have an audit trail that will provide third party verification as to the accuracy (i.e., origin) of the product. In effect, under the threat of penalty, the law requires the final participant in the supply chain (the retailer) to identify the origin of the product being sold; a product that the retailer has no control over until it is delivered to his facilities.

The COOL issue would seem to be rather straight forward in terms of supply chain requirements. For covered products, which are broadly defined as: non-processed, fresh or frozen beef, pork, and lamb; fresh or frozen ground beef, pork and lamb; non-processed fish and seafood; non-

processed fresh and frozen fruits and vegetables; and non-processed peanuts, the retailer **MUST** provide the consumer country of origin labeling at the point of purchase and be able to prove that the origin claims are true and accurate. To be able to make these claims and avoid prosecution, it would seem that a top to bottom supply chain **Source, Materials, Process Verification (SMPV) System**¹ would be an absolute requirement. Each supply chain bringing forward covered products will need to implement a system of verification as to the origin of the original raw material. Nothing less than this would seem to be adequate to provide absolute assurance to consumers that they are buying what the retailer says they are buying.

IV. Analytic Approach

As anybody who truly understands the complexity of the US food system can testify, developing the information, data and processes needed to identify covered products at their retail point of sale by their country of origin is a monumental task. Keeping track of all that information in a form that will allow for verification adds to the burden. Even more difficult is putting together an estimate of the costs to the multitude of participants in the supply chain in meeting the COOL requirements. After all, for the system to provide value to the consumer, all participants in the supply chain will need to do their part. Accomplishing this will result in costs to every segment of the food industry.

Sparks has developed supply chain schematics that generally reflect the flow of product from primary production to the end consumer. For each of these supply chains that are impacted by “covered products” as defined by the COOL law, key supply chain transactional points have been identified. At each primary transactional level of each supply chain, key requirements to satisfy the end requirement of COOL have been identified and a cost has been estimated as it relates to assuring compliance with the law. Since a SMPV system is crudely defined for each supply chain, the cost estimates by segment and supply chain reflect a combination of costs associated with original sourcing of the product; costs associated along the supply chain in gathering, storing and passing on that data to others in the supply chain; costs associated with segmenting product by its country of origin (both operational as well as capital costs) through the supply chain; and costs related to the actual identification of the covered product at the retail point of sale. Overriding the entire supply chain SMPV requirements will be the investment (hardware and software) needed to keep all the information; the costs associated with creating auditable information trails and the costs associated with training those in the supply chain that will be required to manage and monitor the SMPV system. Since many of the requirements of COOL are new and unique to the US food system, putting a cost estimate on them must be done without an experience base from which to draw.

V. Supply Chain Evaluations

The law, as passed, will put requirements on several separate and distinct product categories within the US food industry. The cattle/beef, hogs/pork, fish/seafood and produce (fruits/vegetables) categories are the key food sector supply chains that will be impacted by

¹ SMPV is a process of product tracking defined by Sparks in a study entitled “Linking the Food Chain: Sharing Information and Verifying Sources, Materials and Processes Across Traditional Boundaries”, December 2002.

COOL. In addition, the lamb industry faces COOL requirements, as does the peanut industry. While COOL is of importance to each of these industries just mentioned, Sparks' primary effort on estimating the cost of COOL is directed at the first four supply chains identified above, (livestock/meat, fish/seafood and fruits/vegetables).

A similar methodology was developed for each supply chain analyzed in this report. A reflection of the key components of the supply chain was developed and primary functional sectors of each chain were identified, ranging from basic animal production to slaughter/processing to retail store activities. For each step of the supply chain, primary COOL-related activities were identified, segment cost components were listed, an estimate of the process costs were made and key unknowns were identified which could impact the cost estimates.

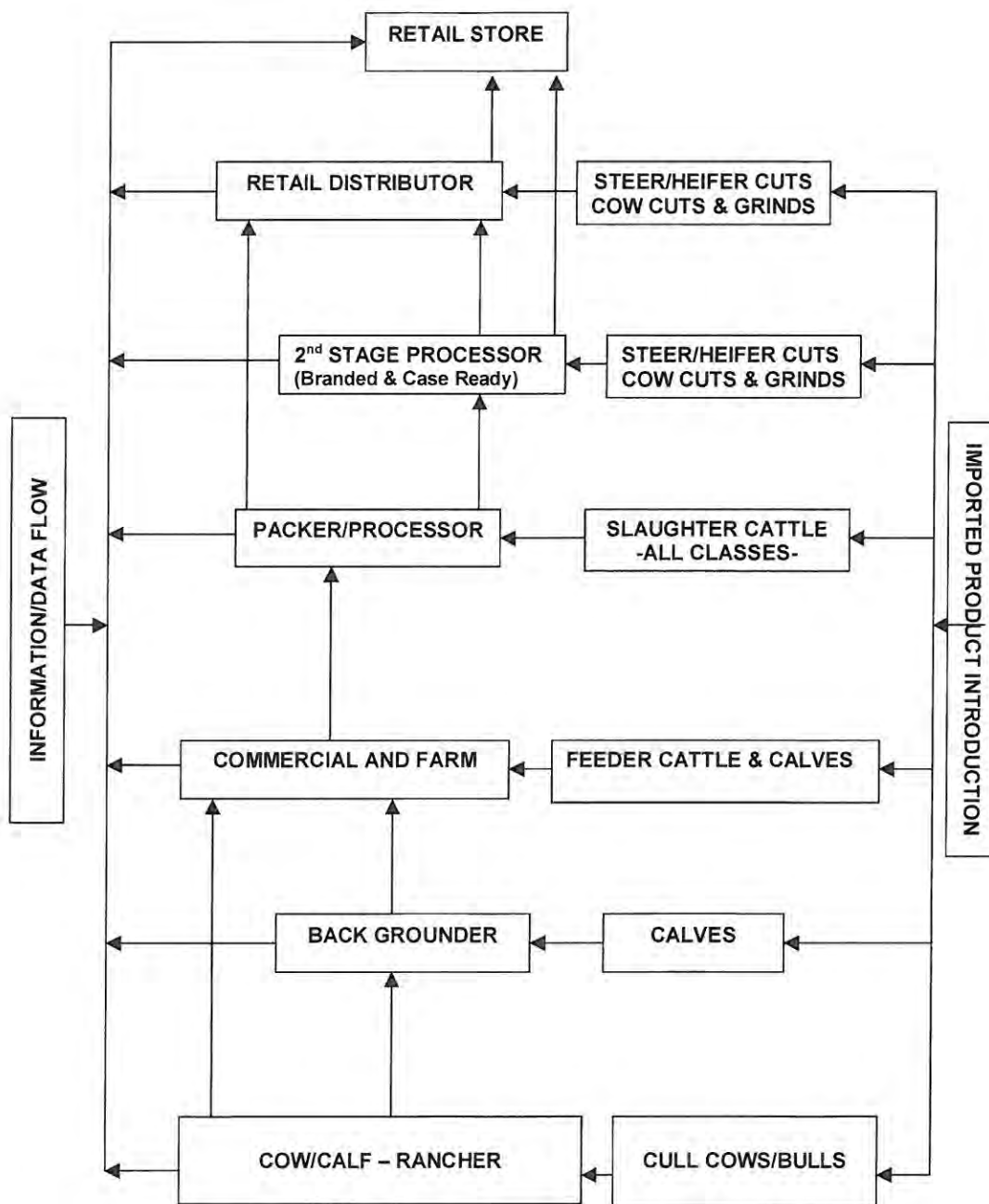
The COOL cost estimates were based on proprietary information and data provided to Sparks by leading industry participants, along with supply chain analysis generated by Sparks supported by the experience base of the professional staff at Sparks. The COOL cost estimates, that have been developed for each segment of each supply chain, have also been verified by knowledgeable industry participants who were not contributors of proprietary information to the study. This was done to assure an objective review of both the estimation process and results.

Cattle/Beef

The cattle and beef supply chain is complex, as exhibited in Figure 1. Meeting the COOL legislative requirement that stipulates that the retailer **must** provide point of sale identification of beef products by country of origin is a near impossible task as there are multiple points within the beef supply chain where live animals and/or beef products are commingled with animals or beef products from another country. How foreign animals entering the US as calves, feeder cattle or fed cattle can be segregated so that beef products from these animals can be identified at the retail meat case would seem to be a monumental, if not impossible, task unless mandatory identification of animals occurs.

Segregating animals or beef products of separate or multiple origins likely will be required at all levels of the beef supply chain. Costs associated with segregating and tracking beef products from birth to the meat case will not only be direct in nature but also indirect as certain costs will be manifested in decreases in production and processing efficiencies. For the beef supply chain, critical supply chain steps are identified; elements of COOL costs are identified and estimates are provided as to the cost on the system.

Figure 1

COOL PROCESS SCHEMATIC- BEEF

One element of supply chain cost that has not been directly assessed in this study is the potential for major capital investments by supply chain participants (especially packer/processors) to facilitate and manage product origin segregation of cattle and beef products as they move through the supply chain. Other submissions have been made by those representing the packer/processor sector suggesting that major re-configuration of packing plants will be needed to accomplish product segregation on the kill and fabrication lines. There can be no question that IF such plant re-configuration was needed, the costs to the industry would be huge. Estimates submitted by the American Meat Institute (AMI) that suggest for a large beef packing plant, the capital investment required would approximate \$50 million cannot be challenged as to its accuracy. But we are hesitant to suggest that such expenses are absolutely required to bring the supply chain into compliance with the labeling requirement.²

In the absence of plant re-configuration that would facilitate multiple designated processing lines to identity preserve product as to its country of origin, there will be added costs to accomplish this end requirement by other means. Batch killing and processing of cattle specifically sorted by common lineage will result in a reduction in line speeds and in overall plant efficiencies. Under all practical plant operating protocols, it would seem likely that additional cooler space will be required to segregate carcasses in the chill stage and prior to fabrication. Product flowing off the end of the fabrication line also will need to be segregated as to origin, resulting in expanded capacity requirements post-fabrication for maintaining identity of boxed beef prior to load out.

Since it is unlikely that retailers will accept co-mingled boxes into their distribution facilities and eventually, out to the store level, cases of beef will need to remain segregated throughout the distribution process (from the packer's coolers to the store's back room). This entire process magnifies the number of Stock Keeping Units (SKUs) that the distribution and retail segments of the supply chain will have to deal with. Individual cases of beef will need to carry origin identification on their bar codes to preserve the identity trail.

Bottom line, the technology exists to provide supply chain compliance with the labeling law. Processes and procedures can be developed and put into place to provide full verification of the labeling claims that will be put on the product. The question is not one of whether the US food industry can meet the requirements of COOL. It is a question of how long might this take and how much it is going to cost to get the job done. Of even greater interest is **who will bear that cost?**

Following are estimates by key supply chain component for the US beef industry.

² American Meat Institute submission to the USDA in response to Country-of-Origin Labeling: Notice of Request for Emergency Approval of a New Information Collection Service. February 21, 2003

STEP 1**RETAIL STORE****COOL-RELATED ACTIVITIES**

1. Information and data requirements – what do the USDA audit requirements entail? Contract, invoice support as documentation?
2. Product labeling and in-store Country of Origin Point of Sale (POS) materials
3. Data collection process, storage and availability – how detailed?
4. Meat Case Segmentation
 - a. Additional SKUs?
 - b. Case Ready Advantages?

PROCESS COST COMPONENTS

- Meat case or individual package labels
- Other POS Materials
- Case Segmentation
- Record Keeping & IT (hardware/software) changes
- Store Labor & Management
- Store Personnel Training
- Direct Audit

ESTIMATED PROCESS COSTS

The COOL labeling requirements faced by retailers cover the full range of covered products as defined in the law. The retailer's investment in expanded product tracking and product segmentation will cross over at least five supply chains. In order to identify costs pertinent to each supply chain, an aggregate estimate of per store costs for all covered products was needed, as many of these costs are common to all products. Aggregate costs experienced at the retail distribution center (as calculated in Step 2) were also put on a per store basis and then added to the store-specific costs. Based on relative product movement through the retail store by covered product category (i.e., beef, pork, fish, vegetables, etc.), an allocation of distribution and retail costs was made to each supply chain. Once this allocation was accomplished, the costs were summed up to a total retail sector burden by category and then calibrated to a per pound and per head calculation so that a total supply chain calculation could be made.

It is important to note that the cost estimates made for the retail distribution and retail store segment of the supply chain are based on a pilot project initiated with a retailer who is going through the process of determining “how to become compliant with the preliminary COOL guidelines”. As expected, the degree of complexity in dealing with COOL at the retail level crosses many functional areas of the distribution center and the retail store. The items impacted are listed above for the retail store and are specifically detailed for the distribution center in Step 2.

Based on an assessment of the requirements, it is estimated that the retail store level costs for the beef supply chain will approximate **7-9 cents per pound** of beef sold. Another **2-3 cents per pound** will occur at the retail distribution center. It is estimated that roughly **8 billion pounds** (on a retail weight basis) of beef are sold each year as fresh beef through retail outlets in the US. If the burden is, in fact, about **10 cents per pound** of product sold and about 35 million head of cattle move through the beef supply chain on an annual basis, the cost per head for the retail burden (distribution and store level) would be nearly **\$23 per head**. This is, admittedly, a huge cost and probably helps explain why retailers have not promoted voluntary country of origin labeling.

KEY UNKNOWNNS

1. Audit requirements at store level are still not fully defined.
2. Audit requirements at distributor level are also unknown. (How much information/data can be centralized and how will that impact store level requirements?)
3. Will retailers shy away from “foreign” products to avoid case segmentation?
4. Will retailers embrace “foreign” case ready and branded products?
5. What pricing differentials will develop for domestic versus foreign origin beef?

STEP 2**RETAIL DISTRIBUTOR****COOL-RELATED ACTIVITIES**

- 1) Information and data requirements – what do the USDA auditors need?
 - Data at box level—bar codes
- 2) Data collection process, storage and availability – how detailed?
- 3) Product segmentation for identity preservation (IP)
 - Segmented warehouse slotting – reduces efficiency
 - Cross docking
 - Scan in/scan out all covered product by case

PROCESS COST COMPONENTS

- Record Keeping & IT
- Labor and Management
- Training
- Direct Audit
- Scanning Hardware/Software
- Segmentation of Product in Warehouse- more SKUs, more slots, reduced efficiency of space, etc.

ESTIMATED PROCESS COSTS

The costs that will be incurred at the retail distribution center will be driven by investment in technology to scan product in and out of the warehouse and to capture and store all pertinent information/data needed to prove country of origin of all product moving through the distribution center. Since the distribution center will be handling covered products from several potential origins, segmentation of the product will be required and the number of SKUs will be significantly larger than under the current system. While much of the process can be mechanized and tracking can be done electronically using bar code readers, there will be time associated with scanning all the product in and out of the facility. In addition, training of the workforce will be an ongoing requirement. Issues related to inventory management are key. The total cost estimated for the beef sector factors back to **2-3 cents per pound.**

KEY UNKNOWN:

- 1) Ability and/or desire to segment product in distribution for origin designation.
- 2) Audit requirements at distribution warehouse or HQ.
- 3) Issues/affects on cross docking.
- 4) Inventory Management and Control.

STEP 3**PACKER/PROCESSOR****COOL-RELATED ACTIVITIES**

- 1) Information and data requirements – what the USDA audit requirements are is unknown.
- 2) Data collection process, storage and availability – how detailed depends on verification needs
 - Labor and hardware/software requirements
- 3) Product segmentation
 - Designated shifts- kill and fabrication
 - Designated cooler slots- capital and operational
 - Sorting capabilities on inbound cattle – scan ear tags at unload
- 4) Capital requirements for sorting pens, coolers and plant reconfiguration

PROCESS COST COMPONENTS

- Pre-harvest sorting/segmentation-capital and operational costs
- Post harvest segmentation- capital and operational costs
- Cost of designated shifts- efficiencies lost if split shifts occur
- Direct audits (2 man-days/audit/covered commodity group)
- Additional coolers or cooler slots- capital costs, inefficient handling
- Scanners, IT software/hardware, bar code transfer system
- Accounting/data storage and retrieval
- Training of personnel- general awareness of requirements, repetitive process due to employee turnover

ESTIMATED PROCESS COSTS

Costs related to segregating animals upon plant arrival, through the slaughter and processing steps and into boxed beef staged to ship to retail and food service customers, along with systems and processes needed to provide detailed documentation of the process flow, are estimated to range from **\$15-18/head per head**. This assumes that the animals are properly identified as to country of origin upon arrival at the plant. Since the final destination of the product by item (retail, food service or export) will seldom be determined until the product is in the box, all boxed product will need to be origin-identified in the box prior to leaving the packing facility. It should be noted that some product will move to a second stage processor prior to moving either to retail or food service. No accounting for the added costs for this expanded activity is included in this estimate.

KEY UNKNOWNNS

- 1) Will packers be able or willing to kill/fabricate cattle of more than one origin?
- 2) Will packers be able or willing to segment beef production by country of origin?
- 3) Will packers designate plants as “retail” or “food service” only?
- 4) Will packers have dedicated shifts or days for specific slaughter by origin?
- 5) Audit requirements?
- 6) What pricing differentials will develop?

STEP 4**FEEDLOT****COOL-RELATED ACTIVITIES**

- 1) Information and data requirements – what the USDA auditors need is still uncertain.
- 2) Data collection process, storage and availability – how detailed depends on verification needs.
 - Labor and hardware/software requirements
- 3) Animal segmentation by country of origin
 - Designated feeding pens by origin
 - Scan cattle in for sort and identification

PROCESS COST COMPONENTS

- Individual animal ID – read or install ear tags to identify animal by origin
- Sort for segregated feeding (by pen or facility)
- Loss of feed pen efficiency
- Scanning hardware, IT system, data storage/retrieval, audits
- Training personnel

ESTIMATED PROCESS COSTS

As cattle enter the feedlot component of the supply chain, there will be a need to identify those animals that have not already been origin tagged. Upon discharge to the feedlot, scanning the cattle or tagging for origin will need to be done. Those of varying origins will need to be sorted and segmented through the feeding process. Estimates of the costs associated with purchase of scanners, associated labor needed for feeding segregation, data storage, retrieval and associated Information Technology (IT) systems needed to properly track cattle in and out will add significant costs to the feedlot operation. Direct costs are put at **\$1.75 per head** and labor costs for each animal over the feeding period are estimated at **\$2.00-\$4.00 per head** for a feedlot sector cost of **\$3.75-\$5.75 per head**. This does not include any capital costs but it does include a slight cost associated with under-utilization of pen space and hence lower occupancy levels.

KEY UNKNOWN

- 1) Will feedlots segregate domestic/imported cattle by facility or pen? Likely required.
- 2) Will feedlot require animal ID (including COOL information)? Probably yes.
- 3) Will feedlots alter their programs for sourcing feeder cattle?
- 4) What pricing differentials will develop?

STEP 5**COW/CALF RANCHER
BACK GROUNDER****COOL-RELATED ACTIVITIES**

- 1) Information and data requirements – what the USDA auditors require is still uncertain.
- 2) Data collection process, storage and retrieval – how detailed depends on verification needs
 - Animal ID tags
 - Scanners- at farm/ranch level or auction markets
 - Accounting hardware/software requirements if any
- 3) Alternative to individual animal ID
- 4) U.S. produced calves – Domestic Passport?
- 5) Imported calves and feeders– Foreign Passport?

PROCESS COST COMPONENTS

- Animal ID tags/chips
- Data input/record keeping
- Scanners – hardware and software if applicable

ESTIMATED PROCESS COSTS

In order for retailers to be able to identify meat products at the retail store level for country of origin, a record on every animal being born or entering the country must be initiated. Creating an electronic passport for each animal will require more up-front cost but will save significant time and effort through the supply chain. Technology exists to implement a system for each domestic and foreign animal to be assigned an ID and for the information contained on the ear tag to be expanded as the animal moves through its production process. At the time of slaughter, this information can be transferred to a bar code on the boxed beef so that country of origin will follow beef products right to the retail meat case. The cost associated with starting the passport trail through several sales transactions up to delivery of the animal to the feedlot for finishing is estimated to cost **\$4.88 per head**. This assumes that the animal is tagged at the farm/ranch or at the first transaction level and that auction markets, commission agents, back grounding operations, etc., have the scanner technology to read and write information on to the electronic ear tag.

KEY UNKNOWNNS

- 1) Will producers accept mandatory animal ID? Will they have a choice?
- 2) Will USDA require animal ID on imported cattle only? If they don't have import ID, do they default to U.S. origin?
- 3) Is there any other way of assuring COOL at retail without a full supply chain SMVP System?

Hogs/Pork

The US hogs and pork supply chain is a highly complex arrangement of production, processing and distribution activities, culminating in the presentation of pork products to the consumer through retail outlets, food service establishments and export markets. Figure 2 provides a highly simplified schematic of the pork supply chain and identifies key segments of the supply chain, product flows and information transfer points. One factor that differentiates the hogs/pork sector from the beef sector as it relates to COOL is the fact that a large percentage of the hog carcass moves into some form of further processing prior to presentation at the retail store. Since processed products are exempt from the country of origin labeling law, hams, bellies (bacon) and many sausage products will not need to be origin identified at retail. This reduces the volume of covered products that need to be origin identified.

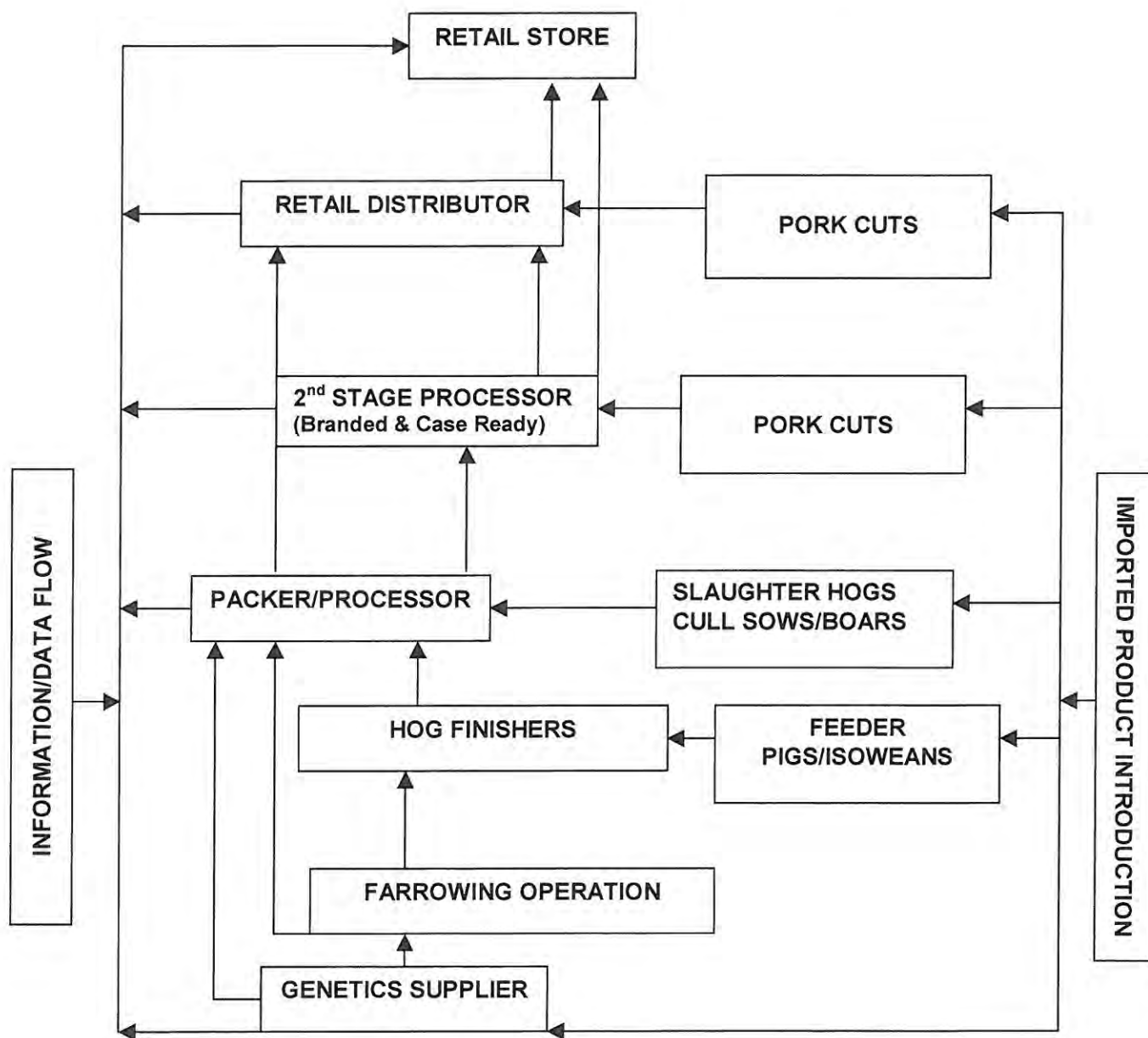
Another distinguishing feature of the hogs/pork sector relative to the beef sector is the level of supply chain concentration and integration. Because of the nature of concentration and integration in the industry, a large number of hogs moving into slaughter and processing will be able to do so without the demands of individual animal identification. It is possible that entire production systems can have their production base fully certified as to country of origin, allowing this certification to provide origin verification for audit purposes. Most of these benefits will accrue to the integrated firms as they can avoid any requirement to segregate product at the plant. Only a portion of the non-integrated production base will likely be treated in the same manner.

Issues for independent producers/packers occur primarily at the processing level as packers source hogs from multiple producers and in a multitude of ways. The broader the supplier base a packer has, the more likely it will be that the packer will insist on some form of animal identification. There will be cases where small/medium or large-scale hog production systems will be able to meet the verification requirement as to origin without individual animal identification. The accounting costs will be more burdensome than for the integrated operation but the full burden of individual animal ID may be averted. While a case can be made for exempting large groups of hogs from individual identification, there will still be a percentage of hogs where some form of ear tag ID system will be the preferred method of identifying and segregating the hogs. At minimum, it is expected that all 6 million breeding stock in the US will need to be individually identified as to country of origin.

For the non-integrated packer, his segmentation issues parallel those identified for the beef sector. When a packer takes delivery of hogs from multiple producers with multiple origin designations, he will need to sort those hogs upon arrival at the plant and keep them segregated according to origin right through the slaughter and fabrication process. Time and costs associated with this segmentation of animals and products rapidly increase the costs of tracking and origin identifying for this component of the production base. The requirement will be for boxes of fresh pork leaving the plant to be bar code identified and sorted by pallet as the product moves into retail distribution. Even though a portion of the product will move into other exempt distribution channels (export, food service, etc.), such end product destination of the product will not be known before the product is in the box. So the origin requirement will exist for all hogs and all fresh pork to the point of product discharge from the packing plant.

Following the pork supply chain schematic on the next page, a full assessment of activities and costs for the pork industry are provided.

Figure 2

COOL PROCESS SCHEMATIC-PORK

STEP 1

RETAIL STORE

COOL-RELATED ACTIVITIES

1. Information and data requirements – what do the USDA auditors need? Contract support as documentation?
2. Product labeling and in-store Country of Origin POS materials
3. Data collection process, storage and availability – how detailed?
4. Meat Case Segmentation
 - Additional SKUs?
 - Case Ready Advantages?

PROCESS COST COMPONENTS

- Meat case or individual package labels
- Other POS Materials
- Case Segmentation
- Record Keeping & IT (hardware/software) changes
- Store Labor & Management
- Store Personnel Training
- Direct Audit

ESTIMATED PROCESS COSTS

The COOL labeling requirements faced by retailers cover the full range of covered products as defined in the law. The retailer's investment in expanded product tracking and product segmentation will cross at least five supply chains. In order to identify costs pertinent to each supply chain, an aggregate estimate of per store costs for all covered products was needed, as many of these costs are common to all products. Aggregate costs experienced at the retail distribution center (as calculated in Step 2) were also put on a per store basis and then added to the store-specific costs. Based on relative product movement through the retail store by covered product category (i.e., beef, pork, fish, vegetables, etc.), an allocation of distribution and retail costs was made to each supply chain. Once this allocation was accomplished, the costs were summed up to a total retail sector burden by category and then calibrated to a per pound and per head calculation so that a total supply chain calculation could be made.

It is important to note that the cost estimates made for the retail distribution and retail store segment of the supply chain are based on a pilot project initiated with a retailer who is going through the process of determining how to become compliant with the preliminary COOL guidelines. As expected, the degree of complexity in dealing with COOL at the retail level crosses many functional areas of the distribution center and the retail store. The items impacted are listed above for the retail store and are specifically detailed for the distribution center in Step 2.

Based on an assessment of the requirements, it is estimated that the retail store level costs for the pork supply chain will approximate **5.5 cents per pound**. Another **2-3 cents per pound** will occur at the retail distribution center. It is estimated that roughly **4 billion pounds** (on a retail weight basis) of covered pork products are sold as fresh pork through retail outlets in the US. If the burden is, in fact, **7.5 cents per pound** of product sold and about 95 million head of hogs move through the pork supply chain on an annual basis, the cost per head for the retail burden (distribution and store level) would be roughly **\$3 per head**. This is, admittedly, a huge cost and probably helps explain why retailers have not promoted voluntary country of origin labeling of pork.

KEY UNKNOWNNS

1. Audit requirements at store level are still not fully defined.
2. Audit requirements at distributor level are also unknown. (How much information/data can be centralized and how will that impact store level requirements?)
3. Will retailers shy away from "foreign" products to avoid case segmentation?
4. Will retailers embrace "foreign" case ready and branded products?
5. What pricing differentials will develop?

STEP 2

RETAIL DISTRIBUTOR

COOL-RELATED ACTIVITIES

- 1) Information and data requirements – what do the USDA auditors need?
 - Data at box level—bar codes
- 2) Data collection process, storage and availability – how detailed?
- 3) Product segmentation for identity preservation (IP)
 - Segmented warehouse slotting – reduces efficiency
 - Cross docking
 - Scan in/Scan out all covered product by case

PROCESS COST COMPONENTS

- Record Keeping & IT
- Labor and Management
- Training
- Direct Audit
- Scanning Hardware
- Segmentation of Product in Warehouse- more SKU's, more slots, etc.

ESTIMATED PROCESS COSTS

The costs that will be incurred at the retail distribution center will center around investment in technology to scan product in and out of the warehouse and to capture and store all pertinent information/data needed to prove country of origin of all product moving through the distribution center. Since the distribution center will be handling covered products from several potential origins, segmentation of the product will be required and the number of SKUs will be significantly larger than under the current system. While much of the process can be mechanized and tracking can be done electronically using bar code readers, there will be time associated with scanning all the covered product in and out of the facility and training of the workforce will be ongoing. Issues related to inventory management are key. The total cost estimated for the pork sector factors back to **2-3 cents per pound** of fresh covered pork sold.

KEY UNKNOWN:

- 1) Ability and/or desire to segment product in distribution for origin designation.
- 2) Audit requirements at distribution warehouse or HQ.
- 3) Issues/effects on cross docking.
- 4) Inventory Management and Control.

STEP 3**NON-INTEGRATED
PACKER/PROCESSOR****COOL-RELATED ACTIVITIES**

1. Information and data requirements – what the USDA auditors need is still uncertain.
2. Data collection process, storage and availability – how detailed depends on verification needs
 - Labor and hardware/software requirements
3. Product segmentation
 - Designated shifts- kill and fabrication
 - Designated cooler slots- capital and operational
 - Sorting capabilities on inbound hogs – scan ear tags at unload
4. Capital requirements for sorting pens, coolers and plant reconfiguration

PROCESS COST COMPONENTS

- Pre-harvest sorting/segmentation-capital and operational costs
- Post harvest segmentation- capital and operational costs
- Cost of designated shifts- efficiencies lost if split shifts occur
- Direct Audits (2 man-days/audit/covered commodity group)
- Additional Coolers or cooler slots- capital costs, inefficient handling
- Scanners, IT software/hardware, bar code transfer system
- Accounting/data storage and retrieval
- Training of personnel- general awareness of requirements, repetitive process due to employee turnover

ESTIMATED PROCESS COSTS

Due to the nature of the mixed production systems that supply hogs to the non-integrated packer, the information, segmentation and tracking issues for packers in this category will be substantially larger than will be the burden for the integrated packer. It will be easier and cheaper to provide verification from a single source production system than from one that might involve several hundred producers offering hogs of several different origins. Once segmentation of the live hogs as they are off loaded occurs, the costs to the packer increase dramatically. While a huge capital investment to reconfigure existing plants may or may not be needed, at a minimum there are sorting, scanning, cooler, product slotting and information system investments that will be required. But efficiencies will be reduced as hog slaughter and fabrication lines are likely to be broken to switch from one origin designation to another. It is estimated that the costs will vary widely for the non-integrated packer depending on the

actual make-up of the hog supply base. An added cost ranging from \$2.00 per hog on the low side to \$6.00 per hog on the high side is estimated.

There are multiple permutations of production flows and slaughter arrangements for the non-integrated component of the US hog production system. In aggregate, it is possible that total production and slaughter/processing costs could range from about \$2.50 per hog to as much as \$7.50 per hog. Since most independent hog producers will be faced with the higher costs, it would seem that implementation of the COOL regulations will create a distinct cost and hence, competitive advantage for the large, integrated production systems. This would seem at odds to what the COOL legislation was purportedly designed to achieve.

KEY UNKNOWNNS

1. Will packers be able or willing to kill/fabricate hogs of more than one origin?
2. Will packers be able or willing to segment pork production by country of origin?
3. Will packers designate plants as "US" or "Canadian" origin only?
4. Will packers have dedicated shifts or days for specific slaughter by origin?
5. Audit requirements?
6. What pricing differentials will develop?

STEP 4**NON-INTEGRATED HOG
PRODUCTION SYSTEM,
FARROW/WEAN/FINISH****COOL-RELATED ACTIVITIES**

1. Information and data requirements – what do the USDA auditors need?
2. Data collection process, storage and availability – how detailed?
3. Live animal segmentation issues-how much co-mingling of hogs occurs?
4. Requirements between sow operations, nurseries and hog finishing operations.
5. Canadian origin designated feeding operations and/or barns.

PROCESS COST COMPONENTS

- Segregated feeding (by pen or facility)
- Individual animal ID or other origin documentation
- Scanning hardware, software and data entry/retrieval for ID system
- Labor to manage segregation
- Training Personnel

ESTIMATED PROCESS COSTS

For that portion of the hog production system where the potential exists to commingle US-origin hog production with Canadian-origin hogs, a system will be needed to identify and segregate hogs as they flow from sow farrowing barns through nurseries and out through the finishing phase of production. For closed independent hog production systems that are not integrated with a packer but do have contractual arrangements that replicate the integrated system, it is likely that individual animal identification, except for breeding stock, will not be required until the hogs reach the slaughter plant and even then, maybe not at all. The live animal verification/documentation process and record keeping costs for this grouping of hogs may be similar to slightly higher than for the integrated operation but will likely range from **\$.50-.75 per hog**. Breeding stock will need to be individually identified as their marketing is more erratic, and the cull animals often travel large distances before being slaughtered.

For hog operations that buy or sell feeder pigs and ship the finished hogs to several packers, it is likely that packers will require individual animal identification for such hogs. Packers will require this as hog deliveries will most likely fall into three origin categories: (1) US-born and raised hogs; (2) Canadian-born but US-raised hogs; and (3) Canadian-born and raised hogs. Since the products flowing from these three primary production alternatives will need to be origin identified out to the retail meat case, the

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COOL system will need to provide the retailer assurance of the actual origin of the hogs. This would seem to suggest an individual ID on this grouping of animals.

Based on the added identification burden that will be faced by hogs flowing through the production phase requiring individual ID, the estimated costs for the live animal phase could be **\$1.50-2.00 per hog**. A blending of the two live animal product flows described above implies that on average, the animal production phase for non-integrated producers could be **\$1.00-1.25 per head** ranging from **\$.50-2.00 per head**. While these costs will exceed those for the integrated hog operation up to the front door of the packing plant, the real cost increases occur once the hogs are discharged at the kill facility.

KEY UNKNOWNS

1. Will hog finishing operation segregate domestic/imported hogs by facility or pen?
2. Will finishing operation require animal ID (including COOL information) or will batch identification be sufficient?
3. Will hog finishing operation alter their programs for sourcing feeder pigs and isoweans?
4. What pricing differentials will develop?

STEP 5**INTEGRATED PRODUCTION SYSTEM****FARROW TO FINISH PRODUCTION,
DEDICATED CONTRACT FINISHING
AND PACKING/PROCESSING****COOL-RELATED ACTIVITIES**

1. Information and data requirements – what do the USDA auditors need?
 - Production system certification
 - Contracts and auditable verification
2. Individual animal ID- **LIKELY NOT** Required
3. Data collection process, storage and availability – how detailed?

PROCESS COST COMPONENTS

- Production system certification
- Contract Certification for growers
- Information input and retrieval
- Information transfer at plant to bar codes on boxes
- Audit

ESTIMATED PROCESS COSTS

The animal identification and tracking burden for integrated hog production and slaughter operations will be much different than for non-integrated systems, which will need to provide segmentation from foreign born or raised hogs. In an integrated system where the packer can fully certify the entire closed production system to contain only US-origin hogs, the cost of creating an audit trail from birth-to-box will be minimal as it only requires developing a third party verification process for the hogs. Fresh pork product leaving the packing plant will still need to be properly identified as to country of origin (US). But most of the costs of individual animal ID and live animal and pork product segregation pre-and post-harvest will not occur. But, breeding stock will still need to be individually identified, since culls are often sold outside the integrated system and to buyers from other parts of the country. It is estimated that the per head cost for COOL compliance on certified integrated operations from animal birth through back door packing plant shipments will be **\$.50 per hog**.

KEY UNKNOWN

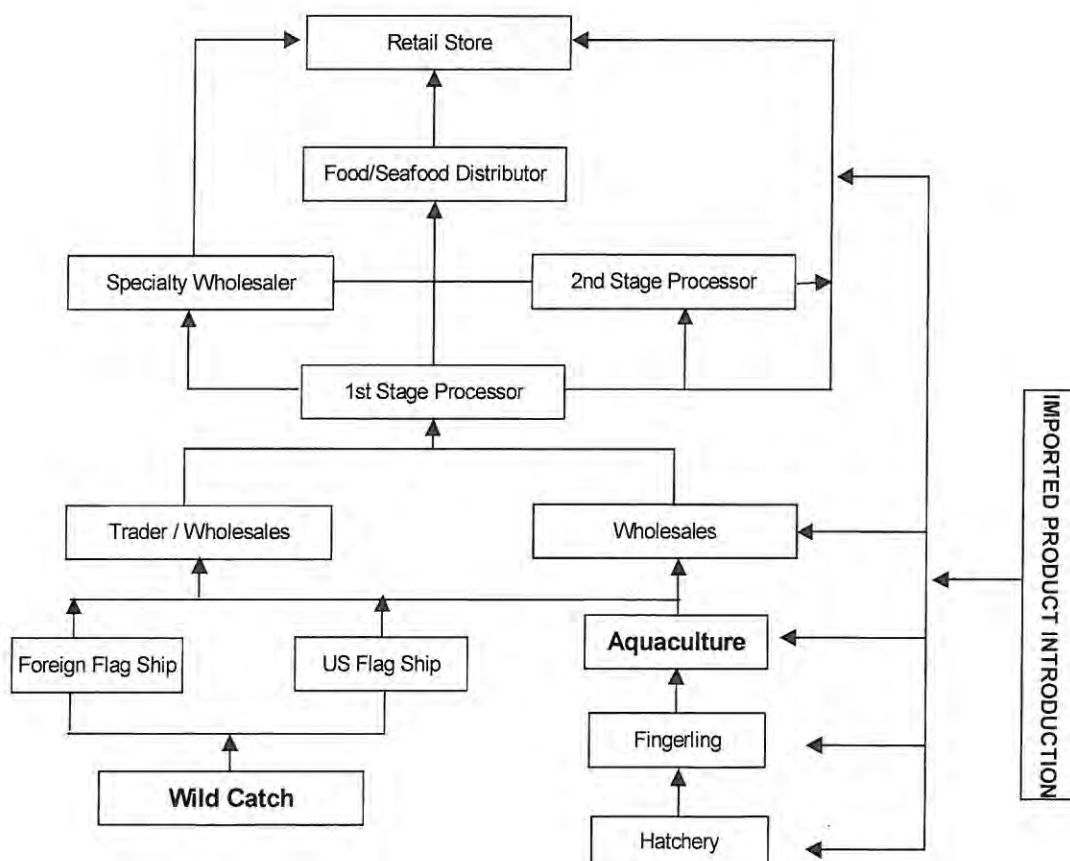
1. Will production certification and certified grower contracts suffice?
2. Will US origin plants for certified production systems face segmentation of product?
3. Is there any other way of assuring COOL at retail without a full supply chain SMVP System?

Fish/Seafood Supply Chain

The seafood supply chain has three distinctive and relevant channels of production. Domestic landings of wild caught fish account for 44% of the domestic edible supply while domestic aquaculture represents about 5% of the domestic edible supply. Imports of wild-caught or farm-raised fish make up the remaining 51% of the domestic edible supply and these imports can include fish caught by a US flagship. Figure 3 provides a basic flow chart identifying the movement of fish and seafood from the point of production/harvest to the retail food store. As with the beef and pork supply chains, the fish/seafood supply chain is complex and the issues related to complying with the COOL requirements are equally onerous.

Figure 3

COOL PROCESS SCHEMATIC - SEAFOOD



Meeting the COOL legislative requirement for fish/seafood stipulates the following:

- For farm-raised fish and shellfish, the product must be fish or shellfish that is hatched, raised, harvested, and processed in the United States.
- For wild fish and shellfish, it must be either harvested in the waters of the United States or by a US flagged vessel and then processed in the United States or aboard a US flagged vessel.
- In addition, the label must distinguish between farm-raised and wild fish products.
- All fresh and frozen fish and shellfish items are covered by COOL guidelines. All cooked and canned fish products, including such items as canned tuna and canned sardines, and restructured fish products, such as fish sticks and surimi, are excluded. Similarly, processed products where the fish or shellfish is an ingredient, such as sushi, crab salad and clam chowder are excluded.

Implementation of COOL related activities for the seafood industry will be complex and costly but potentially not as troublesome as for the beef and pork sectors. Currently, most seafood marketed to the retail sector is packaged and labeled by the processor/distributor (1st stage processing). Also, there is not much commingling of imported and domestically caught/produced fish because most imported fish is packaged. This reduced level of foreign origin/US origin commingling will simplify the segmentation requirement through the processing and distribution segments of the chain, which in turn should lower the costs on a relative basis. The key COOL related activities and cost components for the fish/seafood category are summarized below.

Retail Distribution/Retail Store

Seafood retailers will endure labeling, segmentation and record-keeping costs at both the retail distribution center as well as at the retail store level. Currently, retailers receive boxes of whole fish or fillets into their distribution facility that may already have country of origin information. This information isn't specifically captured and tracked as to country of origin so it is likely that a system of scanning fish and seafood products into and out of the distribution facility will be required in order to put in place a verifiable audit trail for compliance purposes. In order to comply, the retailer will need to add COOL information to the product label in the store, and in some cases segment the display counter to distinguish between domestic and imported fish. It is uncertain at this time as to whether additional cold storage and expanded slotting requirements will be needed in the distribution facility. They may not unless consumers develop a distinct demand based on the origin of seafood. If this occurs, than additional SKU's may be required.

On a per pound basis through the retail distribution and retail store segment of the supply chain, COOL costs are likely to be similar to slightly lower than those for beef and pork even though seafood has a greater variety of species and a lower volume of sales. But, case-ready product is not as popular in the seafood sector; and this could place a larger burden on the retailer than is currently anticipated.

Compliance Costs

The portion of edible seafood supply that would require labeling at the retail store is estimated at approximately 1.0 billion pounds, which is equivalent to about 33% of the total US consumption of fresh/frozen fish and seafood. In arriving at this volume estimate, adjustments were made to discount

consumption volumes for processed seafood (e.g., canned tuna) and foodservice (mainly restaurant) demand, which accounts for nearly two-thirds of total US fish/seafood consumption. Retail distribution costs are estimated at 2-3 cents per pound to cover all activities that will need to occur at the distribution facility. At the retail store level, another 3-4 cents per pound of product sold will occur and this could prove to be conservative depending upon the range of product offerings in the store. At the retail distribution/retail store level of the supply chain, compliance costs for fish and seafood are estimated at 5-7 cents per pound of product sold and assuming 1 billion pounds of product sold in this covered product category, the total industry cost for this segment of the supply chain would be **\$50-70 million**. This estimate includes a combination of batch labeling, individual product labeling, store display labeling and all the activities and their associated costs for product segregation and tracking in the distribution facility and on out to the retail store case. It also assumes that seafood wholesaler/distributors provide adequate and verifiable country of origin information to the retailers.

Processor/Wholesaler

There are about one thousand processors and three thousand wholesalers in the seafood/fish segment of the US supply chain. The largest processors are typically forward integrated from processing to distribution and tend to supply most of the retail market. Small processors typically deliver to food service institutions or small/local retailers.

Compliance of COOL legislation will not be overly difficult for this segment of the supply chain although some additional costs are certain to occur. Large processors already have origin documentation of imported fish (US Customs invoice and label on the shipping box). Domestic fish typically is delivered to the processor in large containers (about 1,000 pounds each) and then processed and boxed into smaller containers. The processors will need to collect documentation from the producer, reconfigure its labels or boxes to note that the fish is a US product, and store the necessary documentation so that other parties in the supply chain can verify the origin information and pass it up the supply chain. Overall, processors will need to connect mostly existing pieces of information into a reporting system (paper or electronic).

It is important to note that large processors already have some type of scanning or tracking technology in place, thus implementation of COOL will not be excessively costly.

Compliance Costs

At the processor/wholesaler level, labeling will be required for approximately 2.9 billion pounds of fresh and frozen fish and seafood. Once again, adjustments were made to discount for processed seafood (e.g., canned tuna) but not for foodservice demand because end point destination of the covered products (retail or food service) will likely be unknown at this point in time so full accounting of all volumes will be needed. Seafood wholesalers that supply both the food service and retail sectors are not likely to segregate retail products for COOL compliance; thus, origin compliance will apply to the larger volume for wholesalers than retailers (2.9 vs. 1.0 billion pounds).

The overall cost of implementing a COOL reporting system and maintaining/storing country of origin information for this segment of the supply chain is estimated to be **\$15 million** or about 0.5 cents per pound. As noted earlier, wholesalers, especially the larger ones, already have a process to identify

several attributes of each fish shipment and will only need to pass incremental origin information to the retailer. They will need to keep a auditable record, however, which adds cost to the system.

Producer (Wild Catch and Aquaculture)

For wild-catch fish, the documentation required is minimal; the flag of the fishing vessel indicates the origin of the fish. Processors and wholesalers will only need to verify the countries that issue the vessel's fishing license. So, there is no apparent hurdle with compliance.

If a foreign flagged vessel harvests fish in US waters, then it will need to show to the processor/wholesaler documentation, (i.e., a fishing license), to qualify the fish for US origin.

However, aquaculture producers need to provide documentation that the fish were hatched and harvested in the US. This will require producers to implement a record-keeping system and maintain/store the necessary documentation.

Compliance Costs

Most fishing vessels and fish farms will need to comply with COOL. At the production stage, it is difficult to segregate foodservice from retail. Currently, the documentation that is passed on from the fishing vessel to the processor/wholesaler already has country-of-origin information, thus there will not be an apparent added cost to fisherman/fishing vessels. (Small intermediaries may have to maintain additional documentation to ensure large wholesalers the origin of the fish.)

The cost for aquaculture producers (2,100 food fish farms in 1997) is estimated to be **\$1.1 million**. This cost is mostly for record-keeping purposes.

Industry Cost Evaluation

The combined cost to the seafood industry is estimated to range from **\$66-86 million**. Table 6 below provides a summary of these costs by supply chain segment. Based on per capita fresh and frozen fish and seafood consumption in the US of 10.3 pounds of which approximately one third is sold through retail, the cost per pound for retail sales are estimated to be 6.6 to 8.6 cents (based on US per capita consumption of fresh and frozen fish was 10.5 pounds/person).

Table 6

Fish/Seafood COOL Cost Summary

	Cents/ Lb.	Segment Cost (Million \$)	Calculation Process
Producer: Wild Catch and Aquaculture		\$1.0	Minimal Cost for Wild Catch; Book Keeping Cost for 2100 Aquaculture Farms
Processor/Wholesaler	0.5	\$15.0	2.9 billion pounds
Retail Distribution	2-3	\$20-30	1.0 billion pounds

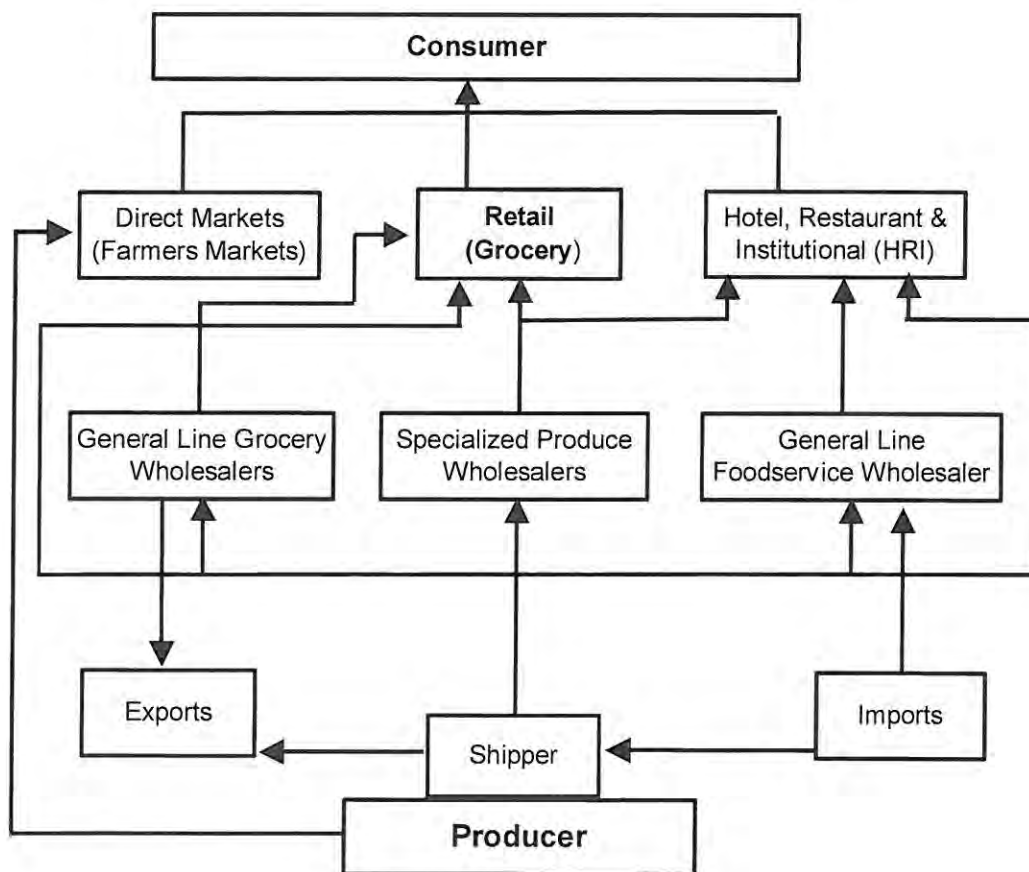
Retail Store	3-4	\$30-40	1.0 billion pounds
TOTAL COST	5-7.5	\$66-86	6.6-8.6 cents per pound sold

Produce Supply Chain

The US consumer eats over 700lbs. per capita (farm weight) of produce on an annual basis comprised of 280 lbs. of fruits and 428 lbs. of vegetables. Fresh produce constitutes about 47% or 328 lbs. of consumption; frozen makes up another 11-12% of consumption or about 84 lbs. while the remaining consists of canned, dried and processed products. It is estimated that roughly half of all produce is bought from retail stores while the remaining is consumed in food service establishments. The flow chart in Figure 4 provides a simple depiction of the flow of produce from the primary producer to the consumer.

Figure 4

COOL PROCESS SCHEMATIC - PRODUCE



The COOL legislative requirements for fruits and vegetables stipulates the following:

- The Perishable Agricultural Commodities Act (PACA) defines perishable agricultural commodities as fresh fruits and vegetables of every kind and character, whether frozen or packed in ice. Therefore, frozen fruits and vegetables (e.g., a package of frozen strawberries, or frozen French fried potatoes made from sliced potatoes) are covered commodities and fall under the country of origin labeling guidelines.
- To maintain consistency with PACA, a frozen fruit or vegetable will be a covered commodity so long as its “kind or character” has not been altered. Therefore, for all perishable agricultural commodities, an “ingredient in a processed food item” is defined to mean an otherwise covered commodity that is a constituent in a food item where the identity of the food item is different from that of the covered commodity (e.g., a frozen prepared pie that includes frozen sliced apples) or is included in a package with significant other foods (e.g., a frozen entree consisting of a pre-cooked meat item and frozen vegetables). Alternatively, when a perishable agricultural commodity is processed (i.e., frozen so as to remain subject to the PACA) and packaged with only preservatives, seasoning, sweeteners or other minor ingredients, the covered commodity would fall under the voluntary country of origin labeling guidelines.

The produce supply chain has the following characteristics that will enable COOL implementation to be a somewhat less troublesome and costly process than for other agricultural sectors; at least up to the point of retail distribution.

- At the retail counter, a significant share of vegetables and especially fruits already display the country of origin individually (e.g., bananas, melons) or in a batch (e.g., apples, citrus). Thus, COOL identification and costs are, in some cases already accounted for at the retail level.
- Prepackaged produce (e.g., strawberries, lettuce, mushrooms, potatoes) in many cases do indicate an origin of the products. If not, the country of origin label can be attached to the existing label/package.
- Imported and most domestic produce is packaged in cartons (batches) that display country of origin. A bill of landing, which typically accompanies produce shipments, also provides country of origin information.
- Because the production of fresh produce is highly integrated with the harvesting, packing and shipping systems, COOL implementation for many primary producers will not be problematic and the potential for commingling of US and foreign origin products is relatively minor.

Compliance will be most troublesome for processed produce that is packaged with only preservatives, seasonings, sweeteners or other minor ingredients and hence, retains its covered product status. Such products will require some level of segregation in the processing facility or specifications that prohibit the use of imported product in blended types of processing (bagged mixed salads or mixed frozen vegetables).

Retail Distribution/Retail Store

The magnitude of costs at the retail distribution and retail store level will depend on factors including the extent to which current labeling practices will need to change for COOL compliance. At the retail distribution facility, there has been a proliferation of product categories in recent years that include more and more specialized fruits and vegetables from foreign countries on a rather continuous basis. In addition, the large seasonal swings in the supplier base that includes locally produced product (when available) and foreign produced substitutes (when local is not in season) adds another layer of complexity to the process of accurately identifying and tracking multiple product categories on an ongoing basis. It is expected that this complexity will require full scale scanning in and scanning out of all produce products to both capture the origin identity of the product and then to make sure that this identity is preserved out to the retail store level.

With the COOL requirement, retailers will most likely need to increase their display counters to segregate produce, or at minimum, to just provide a reasonable method of informing consumers about the origin of the product. For example, avocados from California and Mexico currently are mixed in the same display basket, but in most cases, each has a sticker identifying country of origin. The store will need to monitor and account for these origin differences to be fully in compliance with the guidelines as they are currently written.

The burden of origin of labeling compliance, for most packaged produce, will already have been absorbed by the supply chain prior to this products introduction to the retail distribution facility. Most of these products are already identified, individually or by batches, by the country of origin. The costs that retailers are likely to incur are related to implementing a formal tracking and record-keeping system and in some cases, labeling some produce/display counters.

Compliance Costs

The volume of fresh and frozen fruits and vegetables that qualify as covered products at the retail level are estimated at roughly 60 billion pounds (farm weight equivalent) and probably closer to 50 billion pounds on a retail weight basis. Based on assessments of the costs that will be incurred in the retail distribution facility of 1-2 cents per pound and another 2-4 cents per pound at the retail store level, the per pound compliance cost for this segment of the supply chain is enormous ranging from 3 to 6 cents per pound. Based on estimated volume movements, calculations would suggest a cost ranging from **\$1.5 to \$3.0 billion** given the massive quantity of produce that transacts through the retail food sector.

Wholesaler/Distributor

There are about 6,000 wholesalers and 600 broker/agents³ for fruits and vegetables. Some fresh produce sales occur directly between producer and consumer via farm stands and stores, pick-your-own operations, roadside stands or farmers' markets. (Direct markets constitute only about 1.5% of the combined retail and foodservice value for produce.)

³ The US Census of Wholesale Trade (1997) found 6,121 wholesaler and 689 agents of fruits and vegetables. Relative to the previous census in 1992, the number of these intermediaries has declined.

Wholesalers buy produce, in bulk or packaged, from growers, shippers and importers. There are three general types of wholesalers: (i) general line grocery wholesalers (e.g., Supervalu), (ii) general line foodservice wholesalers (e.g., Sysco) and (iii) specialized produce wholesalers (e.g., Standard Produce). Specialized wholesalers handle approximately 70% of the produce value.

Compliance Costs

Only general line grocery and specialized produce wholesalers would need to identify country of origin to maintain proper records. The volume of fruits and vegetables that these wholesalers handle is estimated at 99 billion pounds (farm weight equivalent). Note that general line grocery wholesalers also deliver to foodservice establishments, but they are not likely to segregate produce for retail or foodservice only. This volume includes all fresh and frozen produce only marketed through retail channels. Compliance costs to provide documentation and origin labeling for the retail store customer base are estimated at around **\$34 million or about 66cts/ton**.

Producer

After being harvested, fresh produce is handled and packed either by a shipper or by the grower. For example, bulk lettuce is often washed and packaged in the field. Grapes are pre-cooled and shipped. Potatoes are stored, packed, shipped and often repacked near the points of harvest.

Compliance Costs

There are approximately 100,000 farms classified as either a fruit or vegetable farm. Under COOL, these producers have to provide documentation to the wholesaler or retailer that the produce is imported or of US origin. These processes are estimated to cost produce farmers approximately **\$20 million**.

Industry Cost Evaluation

Table 7 provides a summary of the costs associated with implementation of the proposed COOL requirements for the produce industry. Most of the costs of implementation will occur at the retail distribution and retail store basis as this is the segment of the supply chain where the burden of detailed tracking and segregation of product will need to take place.

Table 7
Produce COOL Cost Summary

	Cents/Lb.	Segment Cost (Million \$)	Calculation Process
Producer/Grower	Small	\$20.0	Minimal Cost Mostly for Initial Identification and Book Keeping
Processor/Wholesaler	Small	\$34.0	Primarily Book Keeping
Retail Distribution	1-2	\$500-1000	50.0 billion pounds handled
Retail Store	2-4	\$1000-2000	50.0 billion pounds sold
TOTAL COST	3-6	\$1,554-3,054	

Sparks/CBW COOL Cost Assessment

April 2003

- The combined cost to the produce industry is estimated to be **\$1.55 to \$3.05 billion** and we would point out that several industry contacts suggest that this is a very conservative estimate.
- Most of the cost for the produce industry will occur at the retail distribution and retail store level.

Attachment B

Mandatory Country of Origin Labeling: Consumer Demand Impact

November 2012

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Mandatory Country of Origin Labeling: Consumer Demand Impact

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November 2012

The United States implemented mandatory country of origin labeling (MCOOL) which became effective in March 2009 (USDA AMS, 2009a,b). MCOOL requires grocery retailers to provide country-of-origin labeling information for fresh beef, pork, lamb, chicken, goat, wild and farm-raised fish and shellfish, peanuts, pecans, ginseng, and macadamia nuts (Link, 2009). MCOOL for fresh meat products has been laden with substantial controversy for many years. Proponents argue that consumers demand origin information and have the right to know the provenance of meat products they purchase. Opponents contest the regulation claiming compliance increases costs for producers, processors, and retailers with insufficient benefits. Trading partners, led by Canada and Mexico, have challenged MCOOL and presented their case to the World Trade Organization (WTO). The WTO has ruled mainly in favor of this challenge and the United States is in the process of responding to this ruling (WTO, 2012). Given the controversial nature of the policy, a range of pre-MCOOL economic impact assessments were conducted. This fact sheet provides an overview of a research project which conducted the first known post-implementation assessment of how consumer demand was influenced by MCOOL.

Approach

To accomplish the project's objective, a multi-methods approach was used to robustly examine consumer demand impacts. Collectively, these approaches utilized transaction data of meat purchases at grocery stores, as well as experimental economics methods involving in-store and online surveys and real-money experiments with consumers. More specifically, 1) in-person surveys and experiments were conducted in grocery stores in Texas (Klain et al., 2012), 2) surveys and experiments were conducted online with a nationally representative set of respondents (Tonsor, Schroeder, and Lusk, 2012), and 3) meat demand models were estimated using scanner data of MCOOL covered products (Taylor and Tonsor, 2012).¹

¹ Additional details on the various components of this project, a related video summary of key findings, and research papers are available from the authors and will be posted online (<http://www.agmanager.info/livestock/policy/default.asp>) as they become available.

Key Findings

This project generated a host of important findings pertaining to consumer demand response to MCOOL being implemented. The findings of top economic importance include:

1. Demand for covered meat products has not been impacted by MCOOL implementation.

- Across a series of demand system models estimated using retail grocery scanner data of MCOOL covered products, changes in consumer demand following MCOOL implementation were not detected. That is, no evidence of a demand increase in covered beef, pork, or chicken products, as a result of MCOOL, was identified.

2. Typical U.S. residents are unaware of MCOOL and do not look for meat origin information.

- In an online survey, 23% of respondents were aware of MCOOL, 12% incorrectly believed MCOOL was not law and nearly two-thirds of respondents “don't know” whether MCOOL is a law. Similarly, the majority of in-person experiment participants did not know whether MCOOL was in place, despite the fact that they were standing near a retail meat counter. Furthermore, the majority of in-person participants also stated they never look for origin information when shopping for fresh beef or pork products.

3. Consumers regularly indicate they prefer meat products carrying origin information.

However, consumers reveal similar valuations of alternative origin labels.

- In both online and in-person assessments, research participants regularly select meat products carrying origin information over unlabeled alternatives consistent with previous research. However, in an online assessment, consumers revealed valuations of meat products labeled “Product of North America” to be approximately the same as “Product of United States.”

4. Our conclusions hold across the species and products evaluated.

- In our in-person and online based assessments, we obtain the same conclusions whether evaluating beef steak, pork chop, or chicken breast products – there was no change in demand following implementation of MCOOL. Similarly, in estimated demand systems we regularly found no change in demand for beef, pork, or chicken products.

Implications

There are several important economic implications from these key research findings:

1. Given the costs of compliance introduced by MCOOL and no evidence of increased demand for covered products, our results suggest an aggregate economic loss for the U.S. meat and livestock supply chain spanning from producers to consumers as a result of MCOOL implementation. Since existing studies indicate implementation costs have been lower for the chicken industry, this finding also suggests stakeholders in the beef and pork industries are comparatively worse off.
2. The low level of consumer knowledge about MCOOL may imply that focusing people's attention on an origin attribute could bias their valuations upward. For example, the country-of-origin effect has been larger in studies that only investigated origin alone as compared to studies that investigated origin in combination with other attributes. This is reinforced by our observation of no demand increase following MCOOL implementation in spite of previous research suggesting consumers would pay more for products carrying origin information. This does not necessarily mean that on the same shelf, a product with no origin information would have the same value as one with origin information to the consumer. However, implementation of mandatory labeling at the retail level has had no discernible impact on demand.
3. The finding of consumers not valuing meat products carrying *Product of United States* labels over those with *Product of North America* labels is important for several reasons. If a *Product of North America* label is less expensive to implement in the context of MCOOL and consumers fail to place higher value on products carrying *Product of United States* labels, economic gains would occur by utilizing the less expensive labeling requirement.

Conclusions

The overriding finding of limited awareness of MCOOL, narrow use of origin information in purchasing decisions, and no evidence of a demand impact following MCOOL implementation is consistent with the argument that voluntary labeling by country of origin would have occurred if it were economically beneficial to do so. More broadly, the findings of this project generally support the assertions of MCOOL opponents who have asked “where is the market failure?” While no one project can resolve all the political and economic issues surrounding the MCOOL situation, it is our hope that the findings of these studies will be utilized to improve decision making regarding the policy going forward.

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Attachment C



Menu



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Consumers Appear Indifferent to Country-of-Origin Labeling for Shrimp

by **Fred Kuchler** and **Barry Krissoff**



Under the Tariff Act of 1930 and subsequent amendments, consumer-ready packaged foods must indicate whether the foods come from the United States, from another country, or from mixed origins. Until the last several years, random-weight products, such as loose produce, store-cut and packaged meats, and seafood from a store's fish counter, were not required to have country-of-origin labels. Proponents of these labels assert that consumers view the U.S. label as an indication of safety, quality, or as a means of supporting U.S. producers.

In April 2005, fish and shellfish became the first commodities subject to mandatory country-of-origin labeling (COOL). In March 2009, rules became final requiring COOL for red meat, chicken and goat meat, fresh and frozen fruit and vegetables, peanuts, pecans, macadamia nuts, and ginger. ERS researchers explored whether U.S. consumers adjusted their purchases of shrimp in response to the 2005 COOL requirements for seafood. Findings show that consumers were not responsive to the new country-of-origin labels.

Shrimp was chosen for the study for a variety of reasons. Fish and shellfish were the first commodities to fall under COOL requirements. Shrimp is the most popular seafood in the United States, accounting for a quarter of all seafood consumed. Seafood from Southeast Asia, particularly shrimp, has a history of raising food safety concerns, so consumers may be looking for country-of-origin information. The different ways that shrimp is sold to consumers--random-weight shrimp purchased from a fish counter versus consumer-ready packaged shrimp--allow researchers to observe if there are shifts in purchases in response to COOL. Consumer-ready packages of shrimp have carried country-of-origin labels for many years. This information was not required for random-weight shrimp until early 2005.

The researchers used weekly Nielsen Homescan purchase data for 1998-2006 to track household purchases of three distinct products: random-weight shrimp purchased from the fish counter, frozen bagged shrimp, and frozen bagged and breaded shrimp. To isolate the impact of the new COOL, the researchers accounted for the effects of price, consumers' budgets, seasonality, purchasing trends, and demographic characteristics affecting demand for shrimp. If COOL mattered to consumers, shrimp purchases after the rule's April 2005 implementation would have shifted between the types of products. Instead, no such demand shift was observed.

The researchers repeated the study using just households in which at least one household head had attended college, graduated from college, or received an advanced degree. Findings from past studies on nutrition labeling suggest that more educated consumers are more likely to read food labels. This subset of consumers did not alter their shrimp purchases in response to COOL either.

The implications of the research suggest that price is a more important determinant of buyer behavior than COOL, a finding consistent with various consumer surveys. Consumers may also feel that retail outlets, the brand of fish, or existing health and safety regulations provide adequate assurance of the quality and safety of the product without having to rely on country-of-origin labels.

This article is drawn from...

"Do Consumers Respond to Country-of-Origin Labeling?", by Fred Kuchler, Barry Krissoff, and David Harvey, Journal of Consumer Policy, December 2010, Vol. 33, pp. 323-337